United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

E. F. Waters
2-10-66
(3)

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,715

2121

EDYTHE F. WATERS

Appellant

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY

Garnishee-Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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APPELLANT'S STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court below erred in directing a verdict for the Garnishee at the end of the Plaintiff's case, and in ruling that as a matter of law the Garnishee was not liable to the Defendant for the payment of the subject judgment in favor of the Plaintiff?

2. Whether the Court below erred in ruling that as a matter of law the Defendant failed to notify the Garnishee of the injuries sustained by the Plaintiff as a condition precedent to an action against the Garnishee?

3. Whether the Court below erred in ruling that as a matter of law the Defendant was guilty of a misrepresentation as to the ownership of the automobile covered by the insurance policy issued by the Garnishee?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Plaintiff below, appeals from a Judgment entered upon a Verdict directed by the Court in favor of the Appellee, Garnishee below, in a jury action upon issues raised by a traverse to the answers of Garnishee to certain Interrogatories propounded to the Garnishee, seeking to enforce Judgment against the Garnishee's insured.

The District Court had jurisdiction under Section 11-305 and 11-306 of the District of Columbia Code (1951 Edition) and was involved by the filing of the Complaint.

The jurisdiction of this Court is based on Title 28 Section 1291, et seq., of the United States Code, as amended.

STATEMENT OF THE CASE

Appellant, EDYTHE F. WATERS, hereinafter referred to as Plaintiff, filed her suit in the Court below against the Defendant, DORIS V. OSBORNE, to recover damages for serious and permanent personal injuries sustained by her as a result of the negligent operation by the said Defendant of Defendant's automobile in which the Plaintiff was a passenger on September 7, 1957. The Defendant was the holder of a comprehensive Automobile Policy of Insurance (J.A. 61-67), in full force and effect on the day of the accident, and issued to the Defendant by the American Automobile Insurance Company, Appellee-Garnishee, hereinafter referred to as the Garnishee.

Suit was filed against the Defendant and upon being duly served with process, she promptly sent the papers to her insurance agent, Frank J. Rebholz & Son or directly to the Garnishee (J.A. 54). Sometime later, the Garnishee returned the same papers to Miss Osborne, advising her that they would not defend the action against her for the following reasons (J.A. 54):

(1) That though the accident took place on September 7, 1957, the said Garnishee was not advised of the accident as required by the terms and conditions of the policy, and that the first time that the Garnishee received any notice was on or about April 23, 1958 and

(2) That it had come to the attention of the Garnishee that the Plaintiff and Defendant were joint owners of the automobile, whereas the Company had no notice of joint ownership and the policy was solely in the name of the Defendant.

Neither the Defendant nor anyone in her behalf filed an Answer to the Complaint of the Plaintiff. After the time for filing an Answer had

expired, the Plaintiff moved for a Judgment by default (J.A. 3). Judgment was entered in favor of the Plaintiff in the amount of $100,000.00 on the 3rd day of July, 1959 with costs and interest from the date of the Judgment (J.A. 3).

Interrogatories in attachment (J.A. 6) in aid of execution of the Judgment by the Plaintiff were thereafter issued to the American Automobile Insurance Company, as Garnishee, the substance of which related to the possession of the said Garnishee of assets or credits due and owing to the Defendant Doris Osborne by virtue of the policy of insurance on the said automobile. Said Garnishee answered said Interrogatories denying possession of any credit by indemnity or otherwise to the said insured (J.A. 6). To these answers and, pursuant to the practice provided for by Title 16, Sec. 16-317, D.C. Code, 1951 (Same as 16-522, D.C. Code, 1961, as Amended) Plaintiff filed her Traverse to the Answers of the Garnishee (J.A. 7). The Traverse set up a denial of the Answers of the Garnishee to the Interrogatories based upon the liability of the Garnishee upon the insurance policy issued to the Defendant.

At the hearing of the Traverse before a Jury, the Trial Court granted the motion of the Garnishee for a directed verdict at the close of the Plaintiff's case. The Trial Court set forth two reasons for granting the Garnishee's motion for directed verdict (JA 58-60). Firstly, the Trial Court was of the opinion that there had been a misrepresentation as to ownership, and secondly, that there had been a failure on the part of the insured to notify the company in accordance with certain policy provisions. Accordingly, the Jury at the direction of the trial court, entered a Verdict for the Garnishee (J.A. 8).

The uncontroverted evidence that a comprehensive automobile policy, being Policy No. A-168 6119 was issued to the Defendant, Doris Osborne, by the Appellee - Garnishee, American Automobile Insurance Company of St. Louis, Missouri. This policy was issued through the

agent of the Garnishee, a Mr. Rebholz. The policy period was from June 3, 1957 to June 3, 1958, (J.A. 61-65) and originally insured a 1952 Chevrolet, 2-Door Sedan which was owned by the Defendant, a domiciliary of St.Louis, Missouri. The accident in question having taken place on September 7, 1957, it was within the policy period. Nowhere on this original policy of insurance is there any statement to the effect that the Defendant was the sole owner of the automobile, though in fact, she was. In July of 1957, the Defendant traded in her 1952 Chevrolet automobile and purchased a new 1957 Chevrolet two-door Sedan, the vehicle actually involved in the accident giving rise to the original suit. The Garnishee's agent in St. Louis, Missouri was notified of the purchase, and the 1957 two-door Chevrolet Sedan was then substituted for the 1952 Chevrolet on the insurance policy. The Garnishee Insurance Company then forwarded to the Defendant a form entitled, "Addition, Elimination for Substitution of Automobile" (J.A. 67), which was dated July 9, 1957. This was attached to the insurance policy. Again, there does not appear to be any statements or provisions in the insurance policy itself, or on the substitution form, wherein the Defendant stated or was required to state that she was the sole owner of the insured automobile, even though it appears as though she was. At that time, the automobile involved in the accident, and the insurance policy as then in effect were the objects of the Trial Court granting a directed verdict in favor of the Garnishee. There is one additional endorsement to the policy of insurance. This was a "Substitution of Automobile," effective November 26, 1957, in which the 1957 four door Chevrolet was substituted for the 1957 two door Chevrolet (J.A. 68), which was a total loss in the accident (J.A. 39). This substitution of automobiles was the first time that any statement as to ownership appears. The clause, "The named insured is the sole owner of the automobile, except as stated herein:" (J.A. 68) appears in the substitution of automobile, and is blank, because the Defendant, once again, was the sole owner, of the automobile. However, for purposes of the Garnishment proceeding

giving rise to this appeal, the last mentioned substitution form should not have been considered a part of the insurance policy, but only as evidence that the garnishee insurance company knew of the loss of the two door Chevrolet in the subject accident.

The policy in full force and effect on the day of the accident obligated the Garnishee, among other provisions, to defend any suit filed against the named insured which alleges bodily injury and which seeks damages under the terms of the policy, even though the suit be groundless, false or fraudulent. The policy further obligated the Garnishee to pay any Judgment rendered against the named insured, the Defendant herein (J.A. 61, Coverage A).

The Plaintiff and Defendant met one another for the first time while members of the Women's Army Corps of the United States. At the time, both were stationed at Fort McPherson, Georgia (J.A. 12). The Defendant owned a 1952 automobile. The Defendant decided to trade this 1952 automobile for a 1957 Chevrolet. The Defendant went to an automobile dealer in Atlanta, Georgia, Nalley Chevrolet for this purpose (J.A. 13). With reference to this new automobile, the Plaintiff emphatically denied any ownership whatsoever throughout her entire testimony on this highly important phase of the case. The Plaintiff's testimony was as follows (J.A. 13-14):

Direct examination by Mr. Kiley, attorney for Plaintiff.

BY MR. KILEY:

Q. Now, after the 1957 Chevrolet was delivered to Miss Osborne, she drove it from the place? (J.A.). A. Yes.

Q. Did you have a set of keys to the car? A. No, I didn't.

Q. Did you ever use it? A. Not that I can recall. I might have driven it sometime or other but I can't recall.

Q. Did you ever use it without Miss Osborne's permission? A. No.

Q. And you can't recall whether you ever used it on business of

your own? A. Probably would not have been business because I didn't have any business in Atlanta, Georgia.

THE COURT: I think counsel means for your own use as distinguished from other business or pleasure.

THE WITNESS: No, I didn't.

BY MR. KILEY:

Q. Was this car fully paid for or was it financed? A. It was financed.

Q. Did you make any payments on the car out of your own funds? A. No, I didn't.

Q. Did you make any application for insurance on the car? A. No, I didn't.

Further direct examination of Plaintiff (J.A. 16):

Q. Now, at any time during the period the 1957 Chevrolet was in use, did you have any interest in it? A. No, I didn't.

Q. You had no insurance on it? A. No, I didn't.

Q. You made no payments on it? A. No, I didn't make any payments.

Q. Were you aware that Miss Osborne had collision coverage with one company and liability coverage with another company? A. No, I didn't know that -- know what type of insurance she had.

And on cross-examination as follows (J.A. 23):

BY MR. GRAHAM:

Q. And do you now say under oath that the car was not jointly owned by you and Miss Osborne? A. I have never believed it was jointly owned, and I say now that it was not jointly owned.

Q. Who told you to say it was not jointly owned? A. I have always said it was not jointly owned. As I said, on all of these papers, sometimes just like depositions, that I gave to you, I can't remember all of these papers word for word and the words, I am not familiar with them.

Gilbert Rosenthal testified on behalf of the Appellant substantially as follows: That he is an attorney practicing in the City of Baltimore and Baltimore County primarily. He has offices in the City of Baltimore (J.A. 30). At the time that he first met the Appellant, the Appellant advised him that there was another attorney in the case. He subsequently was retained by the Appellant after the Appellant wrote to the first lawyer and received no reply after a substantial period of time. It was at this time that Mr. Rosenthal wrote to the Garnishee by a letter dated April 21, 1958, advising the Garnishee that he represented the Appellant for the injuries she sustained in the automobile accident on September 7, 1957 (J.A. 34).

The Defendant, Miss Osborne, testified that she purchased a 1957 Chevrolet at Nally Chevrolet while she was in the Women's Army Corps in Atlanta, Georgia. Her testimony clearly indicated that she appeared to be the sole owner of the automobile, when she testified as follows (J.A. 38):

Direct examination by Mr. Kiley, attorney for Plaintiff:

Q. Who selected the car? A. I selected the car.
Q. Who paid for it? A. I paid for it.
Q. Who had the insurance on it? A. I had the insurance.
Q. Who paid for the insurance? A. I did.
Q. Who had the keys to it? A. I had the keys.
Q. Did Miss Waters have a key to the car? A. No, she didn't.

The Defendant further testified that she had a separate insurance company for the collision coverage and for the liability coverage (J.A. 38). As a result of the accident, the Defendant was also in the hospital and she asked someone to advise both insurance companies of the accident (J.A. 39-40). The collision carrier was definitely advised of the accident, and the Defendant received a replacement automobile for the one that was totally demolished in the accident (J.A. 40). The Defend-

ant appears to have notified her insurance company, through the agent of the Garnishee, that the first 1957 Chevrolet had been totally demolished, and that was the reason for the substitution of the second 1957 Chevrolet (J.A. 41). The Defendant did state that the Plaintiff had no say in the selection of the car and that she had turned in her 1952 Chevrolet as a partial payment on the 1957 Chevrolet (J.A. 42).

STATEMENT OF POINTS

1. The Court below erred in directing a verdict for the Garnishee at the end of the Plaintiff's case, and in ruling that as a matter of law the Garnishee was not liable to the defendant for the payment of the subject judgment in favor of the Plaintiff.

2. The Court below erred in ruling that as a matter of law the defendant failed to notify the Garnishee of the injuries sustained by the Plaintiff as a condition precedent to an action against the Garnishee.

3. The Court below erred in ruling that as a matter of law the defendant was guilty of a misrepresentation as to the ownership of the automobile covered by the insurance policy issued by the Garnishee.

SUMMARY OF ARGUMENT

From the testimony, it would appear that the Plaintiff had established a prima facie case. It was proved that there had been a judgment in the original action for damages in the amount of $100,000.00; that the judgment remained unsatisfied; that the Garnishee, by virtue of the policy of insurance then in effect, agreed to pay any judgment rendered against the insured; and that the defendant was a judgment debtor within the terms of the policy.

The insurance policy having been made in Missouri, the substantive law of the state of Missouri should be relied upon in interpreting the policy and the conditions thereof.

The burden of proof as to the two claims of the Garnishee, namely the lack of proper notice and the misrepresentations, appears to fall directly upon the Garnishee. The Garnishee had not introduced any evidence or witnesses to establish a breach of any clause in the policy at the time that the trial court granted the Garnishee's motion for a directed verdict. Therefore, at that point, it would appear as though an issue was created for determination solely by the jury, under well established principles of law defining the province of court and jury, and did not warrant the direction of a verdict in favor of the party having the affirmative of the issue. Upon the motion for a directed verdict, the evidence was required to be construed most favorably for the Plaintiff. There was no evidence offered by the Garnishee to contradict the evidence of the Plaintiff. All of the testimony offered by the Plaintiff was to the effect that the Defendant was the sole owner of the automobile. The testimony of the Plaintiff also showed that notice had been given to the Garnishee through its agent.

Therefore, construing the evidence most favorably for the Plaintiff, the trial court erred in granting the Garnishee's motion for a directed verdict as a matter of law.

ARGUMENT

I

The Court Below Erred in Directing a Verdict for the Garnishee at the End of the Plaintiff's Case, and in Ruling That as a Matter of Law the Garnishee Was Not Liable to the Defendant for the Payment of the Subject Judgment in Favor of the Plaintiff.

A

As to Plaintiff's Prima Facie Case.

The traverse by the Plaintiff to the answers of the Garnishee (J.A. 7) placed the burden upon the Plaintiff to show that the Garnishee was liable for the judgment rendered against the Defendant. The evidence introduced included proof of the judgment against the Defendant in the amount of $100,000.00 (J.A. 3), that no part of this judgment was paid (J.A. 29), that the Garnishee had issued a policy of automobile liability insurance to the Defendant, the owner of the automobile involved. The policy itself was introduced into evidence in its entirety (J.A. 61-68). At this point, the Plaintiff had established a prima facie case.

B

The Court Below Should Have Relied Upon the Substantive Laws of the State of Missouri in Ruling on Garnishee's Motion for a Directed Verdict

The testimony introduced before the Court below confirms without contradiction that the Laws of the State of Missouri should have governed the substantive law and decisions which arose therefrom. The policy of insurance itself shows that the Garnishee appeared to have its home office located in Missouri, for the very heading is as follows (J.A. 61):

"AMERICAN AUTOMOBILE INSURANCE COMPANY
"SAINT LOUIS, MISSOURI"

The sticker affixed to the policy by the agent of the Garnishee also shows the agent to be located in Missouri (J.A. 61):

"FRANK J. REBHOLZ & SON
"ALL FORMS OF INSURANCE
"506 OLIVE ST. ST. LOUIS 1, MO."

It is not clear from the testimony whether the policy was given to the Defendant in Missouri, sent to her in Missouri, or sent from Missouri to her, but in either event the last act, i.e., the acceptance by the insurer Garnishee and giving or forwarding the policy to the Defendant took place in Missouri.

Because there may be a dispute as to whether federal or state laws, and if the latter, which state laws and cases should control in the instant garnishment proceedings, it appears highly relevant to establish in the beginning that the laws of Missouri should be relied upon when taking into account the substantive questions presented before the Court below, and again here on appeal.

In *Federal Practice and Procedure*, the distinction between procedural and substantive law is discussed. On Page 32, the authors state:

> "In 1938, the Supreme Court handed down its decision in *Erie Railroad Co. v. Thompkins*, overruling *Swift v. Tyson* and holding that in civil cases based on diversity of citizenship in matters of substantive law, Federal Courts must follow the law of the appropriate State." 1 Barron and Holtzoff, *Federal Practice and Procedure* (1960) §8.

In *Erie Railroad Co. v. Thompkins*, 58 S. Ct. 817, 304 U. S. 64, 82 L. Ed. 1188 (1938); Page 78 of the U. S. Reports, explained:

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the

> State shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal concern."

With specific reference to the laws governing the nature and interpretation of contracts, in *L. B. Smith, Inc. v. U.S.*, 145 F. Supp. 216 (1956), the Court held as follows:

> "The Federal Courts follow the rule that the nature, validity and interpretation of contracts are governed by the law of the State where the contracts are made . . ."

From these references, it would appear that the State laws would prevail in the determination of substantive matters. Assuming this to be true, the question now arises as to which State laws and cases should control.

An insurance policy being basically a contract, the *Lex Loci Contratus* should prevail. As illustrated in Corbin on Contracts (1963) § 78, p. 333:

> "[I]t is now the prevailing rule that the offeree has power to accept and close the contract by mailing a letter of acceptance, properly stamped and addressed, within a reasonable time. The contract is regarded as made at the time and place that the letter of acceptance is put into the possession of the post office department." (Emphasis supplied)

The Restatement of Laws of Contracts, *American Law Institute* (1932; 1948 and 1954 Supps.) § 74, states as follows:

> "A contract is made at the time when the last act necessary for its formation is done, and at the place where that final act is done."

Though the above set forth the general law of contracts, it is to be noted that The Restatement of Conflict of Laws, *American Law Institute* (1934) § 326, sets forth the following as recognized law:

> "When an offer for a bilateral contract is made in one State and an acceptance is sent from another State to the first State in an authorized manner the place of contracting is as follows:
>
> "(a) if the acceptance is sent by an agent . . .
>
> "(b) if the acceptance is sent by any other means, the place of contracting is the state from which the acceptance is sent."

Two other relevant sections of the Restatement of Conflict of Laws, supra, are Sections 332 and 347, which set out, respectively:

> "The law of the place of contracting determines the validity and effect of a promise with respect to
>
> ". . .
>
> "(e) fraud, illegality or any other circumstances which make a promise void or voidable;"

being § 332; and

> "The law of the place of contracting determines whether a promise is void, or voidable for fraud, duress, illegality or mistake for other legal or equitable defenses."

being § 347.

The State of Missouri appears to be in accord with all of the above. In *Thacker v. Massman Construction Co.*, 247 S.W. 2d 623 (1952), the question of whether Missouri or Kansas Law would apply in a contractual matter was discussed. The Court held, on Page 630:

> "The contract having been consummated in Missouri, it was a Missouri contract. It is well settled law that the place where the final act occurs which makes a binding contract is the place of contract ... Am. Law Institute's Restatement of the Law of Contracts, Sec. 74."

Therefore, it appears to be immaterial as to whether the insurance contract in question was delivered to the Defendant in Missouri, or sent to her in Missouri or elsewhere. The controlling factors appears to be the fact that the policy was written in Missouri by a Missouri insurance company (Garnishee herein) and through the Missouri agent of the said Garnishee. Based upon these factors, it is submitted that the Court below should have relied upon the substantive laws of the State of Missouri in making the decision to grant a directed verdict for the Garnishee at the close of the Plaintiff's (Appellant's) case.

II

The Court Below Erred in Ruling That as a Matter of Law the Defendant Failed To Notify the Garnishee of the Injuries Sustained by the Plaintiff as a Condition Precedent to an Action Against the Garnishee

In the opinion given by the Court below (J.A. 58-60), the trial court erroneously found that there was a lack of notice by the insured to the insurance company in violation of a condition of the policy, and that this condition was a condition precedent to any action brought against the insurance company (Garnishee). However, the cases of the State of Missouri do not appear to support this position at all.

The Courts in Missouri have consistently held that the failure of an insured to give notice within the period stated in a policy of insurance will not relieve the insurance company from their duty to defend the insured, unless the policy contains a forfeiture clause in the policy itself. In 1934, the same Garnishee as in the case at bar, namely, the American Automobile Insurance Company, made the exact same claim. That case, *Walker to Use of Foristel v. American Automobile Ins. Co.*, 70 S.W. 2d 82 (1934), concerned an accident which took place on June 16, 1926. No notice was given by the insured until after suit was filed in May, 1927, eleven months later. The suit was forwarded to the American Automobile Insurance Company, and four days later it

was returned to the insured with a letter to the insured that the company would not defend the suit because of the policy violation with reference to immediate notice. Judgment was obtained by the Plaintiff, and garnishment proceedings were filed against American Automobile Insurance Company. The Garnishee therein urged that the failure of the insured to give immediate written notice as required by the policy defeated the liability on the policy. However, the Court held otherwise. In reviewing most of the law on this subject in the State of Missouri to 1934, the Court held on Page 88, as follows:

> "Obviously the notice provision in this policy is a provision looking to the avoidance of liability, and it suffices to say that the courts of this state, and elsewhere with a few exceptions, have refused to regard a provision such as this as a condition that defeats recovery or avoids liability for failure to give the notice within the time stipulated, in the absence of any showing of prejudice to the insurer thereby, unless the policy expressly so declares in some sort of appropriate and unambiguous language." (Emphasis supplied).

Just as there was no forfeiture clause in the *Walker* case, *supra*, none is to be found in the insurance policy which was introduced in the present case. (J.A. 61-67). There being no forfeiture provision in the *Walker* case, *supra*, the Court held against the Garnishee. It is to be noted in the present case, that there also is no forfeiture provision in the policy of insurance issued by American Automobile Insurance Company to Osborne.

For another instance of this principle, see *Western Casualty & Surety Co. v. Coleman*, 186 F.2d 40 (8th Cir. 1950). In that case, the language used with reference to notice being given as soon as practicable, and the language used in making it a condition precedent that no action shall lie against the company unless there has been a full compliance with the terms of the policy are similar to the words of the policy in the present case. The accident in the *Western* case, *supra*,

took place in November, 1944, but was not reported until suit was filed in June, 1945, some seven months later. The Court applied the substantive law of Missouri, and after a thorough examination of the Missouri cases, held, on Page 44:

> "The Missouri cases cited have established the rule that failure of an insured to give notice of an accident will not defeat his rights under a liability policy unless it contains a provision for forfeiture in that event or unless the insurer proves that the failure resulted in prejudice to it."

A more recent case, *Hawkeye-Security Insurance Company v. Davis*, 277 F.2d 765 (8th Cir. 1960) is also on point. In that case, the language under the paragraphs "Notice" and "Action Against Company" are verbatim the language in the policy which was issued by the Garnishee in the present case to Osborne. The *Hawkeye-Security* case, *supra*, evolved from a declaratory Judgment action wherein the insurer asserted that it was under no obligation as to the particular accident because notice was not given as soon as practicable; that notice was a condition precedent to the liability of the insurer; and that there was no reasonable excuse for the delay in giving notice. However, the Court found otherwise. After stating that since the insurance policy was a Missouri contract and consequently, the Missouri law would control, the Court made the assumption for the purposes of the Appeal that the defendants had breached the policy provision of notice as soon as practicable. *Hawkeye-Security Insurance Company, supra*, p. 768. After a substantial review of prior Missouri decisions, the Court reaffirmed the Missouri cases to the effect that unless there is a specific forfeiture provision in the policy, failure of an insurer to give proper notice of an accident will not defeat the rights of the insured unless the insurer can prove that it was prejudiced by this lack of proper notice.

Though not a Missouri case, the case of *Dixie Auto Ins. Co. v. Goudy*, 382 S. W. 2d 380 (1964) is one of the most recent cases to be

found. Here, there was a default judgment against Goudy after Dixie refused to defend the case on several grounds, one being the lack of proper notice. After citing 45 C.J.S. Insurance § 1062 and 18 A.L.R. 2d 491, the Court stated on p. 383 as follows:

> "It is well settled by the later cases involving this point that the insurer is precluded from defending successfully against an action brought under a liability policy on the ground of a violation by the insured of the provision as to notice ... where it had denied liability on some other ground."

The above appears to be the latest prevailing law with regard to notice. In the present case, aside from the fact that there was no forfeiture clause within the policy provisions to enable the Garnishee to prevail on the defense of lack of notice, it is now questionable as to whether or not the Garnishee might even use the defense of notice inasmuch as the Garnishee has also raised the defense of misrepresentation, when taking into account the *Dixie* case, *supra*.

In any event, there being no forfeiture clause in the policy (J.A. 61-67) filed in the present case, and no prejudice having been shown by the Garnishee prior to the verdict being directed in favor of the Garnishee at the end of the Plaintiff's case, it is respectfully submitted that the Court below erred that as a matter of law the insured failed to notify the Garnishee in accordance with the insurance policy as a condition precedent to an action against the garnishee.

III

The Court Below Erred in Ruling That as a Matter of Law the Insured Was Guilty of a Misrepresentation as to the Ownership of the Automobile Covered by the Insurance Policy Issued by the Garnishee.

One of the reasons the Court below granted the Garnishee's motion for a directed verdict was the ground of misrepresentation as to ownership, in the opinion of the trial court. In its oral opinion, the trial court decided as follows (J.A. 58):

> "(1) That the insured declared that she was the sole owner of the automobile covered by the policy, whereas the evidence shows that the automobile was jointly owned . . . This was a false material representation. See Paragraph 29 (sic.) of the CONDITIONS of the policy . . . Insured admits joint ownership. . ."

Again, based upon the Missouri law as to substantive matters, and the procedure of the District Court, it appears to be extremely difficult to reconcile the granting by the trial court of Garnishee's motion for a directed verdict at the end of Plaintiff's case. The testimony of the Plaintiff, among other things, was the fact that she did not recall ever having used the Defendant's automobile, she did not make any payments on the Defendant's automobile nor did she make any application for insurance on the Defendant's automobile (J.A. 14, 16). She also testified that she did not have a set of keys to the car (J.A. 13). On cross-examination, the Plaintiff specifically stated the following (J.A. 23):

"A. I have never believed it was jointly owned, and I say now that it was not jointly owned."

Of utmost importance is the fact that the trial court, at one point, specifically stated that the question of ownership of the automobile was a Jury question (J.A. 16):

BY MR. KILEY:

Q. Now you will recall in his address to the Jury or his opening statement to the Jury that Mr. Graham indicated that in the Declaration, and properly so, that we alleged that the car in which you were injured was jointly owned. Can you account for that in any fashion?

MR. GRAHAM: I object to that, Your Honor. The Complaint speaks for itself.

THE COURT: I don't think it is a question of accounting for that, sir. I think that is in evidence, and her statement that it wasn't jointly owned. If that is a fact, it will be for the jury to determine. (Emphasis supplied).

MR. KILEY: All right, Sir.

THE COURT: Ladies and Gentlemen, you are the ultimate judges of the facts, and not counsel and not the Court.

Furthermore, the testimony of the Defendant showed that the Defendant selected the car, paid for it, had the insurance on it, paid the expenses and upkeep, had the keys (J.A. 38), and that as far as the Defendant was concerned, the Plaintiff was merely a co-signer for her (J.A. 43). Even on cross-examination, the Defendant again reiterated that as far as she was concerned, the Plaintiff was merely a co-signer. (J.A. 49).

Since the Garnishee relied upon the breach of provisions in the policy of insurance, it would appear as though the burden would fall upon the Garnishee to prove its case as a matter of law before the trial court should have granted the Garnishee's motion for a directed verdict. See Missouri cases of *Meyers v. Smith,* 275 S.W. 2d 9 (1964), and *Finkle v. Western Automobile Ins. Co.*, 26 S.W. 2d 843 (1930). However, before the trial court should grant a directed verdict at the close of the Plaintiff's case, it must be shown as a matter of law that there was only one inference which might be deduced from the evidence as presented.

Though the case of *Galt v. Phoenix Indemnity Co., Inc.*, 120 F.2d 723 (D. C., 1941), was directly concerned with the cooperation clause in a liability policy of insurance, the Court still set out the applicable rule on page 724 to be as follows:

> "The rule governing this question is that the motion to direct a verdict admitted every fact and evidence which tended to sustain Appellant's case, together with every inference reasonably deducted therefrom; and that if there was any evidence from which the Jury could reasonably have found for the Appellant, upon proper instruction of law, the Order directing a verdict was improper."

Consequently, the directed verdict granted to the Garnishee at the end of the Plaintiff's case in the *Galt* case, *supra*, was reversed.

For a rather detailed look into the granting of directed verdicts, one need look no further than *Baltimore & Ohio R.R. Co. v. Rostom*, 177 F.2d 53 (D.C. Cir. 1949), where the Court held on page 54:

> "If substantial evidence is presented, which, if credited, would sustain a verdict in favor of one party or the other, the case should be left to the jury. It is not for the Court to weigh the issue on both sides of a contested case. To do so is the function of the jury. If the evidence is conflicting, the conflict must be resolved by the jury. If divergent inferences may be drawn from the evidence, the selection of the proper deduction is also a function of the jury . . . The trial court on a motion for a directed verdict must view the evidence from the standpoint most favorable to the adverse party . . . If there is substantial evidence from which such deductions can be made, the motion must be denied, as the jury is clothed with the function and power of determining whether to make them."

Looking now at the instant case, it is apparent that the same rule should apply. The Court below did not cite any authority for its opinion. The Court below even stated to the Jury at one point that they were the

ultimate judges of the fact as to the ownership of the automobile (J.A. 16), yet he did not let the case go to the jury. In his final opinion, the Court below granted the Garnishee's motion for a directed verdict even though he stated that, under the law, he was required to view the evidence in the light most favorable to the Plaintiff, including all inferences reasonably deductible from the evidence (J.A. 59). These statements do not appear to conform with the testimony as presented at the time of the trial.

It might very well have been that the Jury might have found that the Plaintiff was merely a co-signer for the Defendant. Both the Plaintiff and the Defendant testified to this account which if found to be the true facts of the case, would have warranted a judgment in favor of the Plaintiff. Under all of the evidence presented, there were <u>two</u> available conclusions. Either the Plaintiff and Defendant were joint owners of the automobile in question, or the Defendant was the sole owner. The motion for a directed verdict not only admitted the truth of the direct testimony offered by the Plaintiff and the Defendant, but <u>all inferences</u> which could favorably be drawn therefrom. *Walford v. McNeil*, 69 App. D.C. 247, 100 F.2d 112. At this point, the question of ownership resolved itself into one of fact for the jury, and not one of law for the Court.

However, assuming that the Plaintiff and Defendant were joint owners of the automobile, before getting into the Missouri cases themselves, it is necessary to look once again at the policy of insurance (J.A. 64). In Paragraph 20, the following is printed:

> "20. Declarations. By acceptance of this policy, the insured named in Item I of the Declarations agrees that the statements in the Declarations are his agreements and representations, that this policy is issued and relies upon the truth of such <u>representations</u> and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance." (Emphasis supplied)

From this it can readily be seen that the Garnishee, in its own words, refers to the provisions in the policy as "representations."

In an early Missouri case, *Commercial Bank v. American Bonding Co.*, 187 S.W. 99 (1916) the Bonding Company attempted to render the bond void because of certain statements which they contended to be false. After a general statement concerning warranties and representations, the Court held, on page 101 as follows:

> "This statement, as we said before, was not made a warranty by any of the terms of the contract before us, and can therefore be considered only as a representation."

Conceding the fact that the representations made were false and untrue, the Court in the *Commercial Bank* case, *supra*, went on to say the following at page 101:

> "The law is well settled that representations are not a part of the contract in the sense that warranties are; that is they are inducements to a contract, but not facts which are contracted to be true. It is also settled that a representation does not have to be literally true as does a warranty . . .
>
> "There is yet another distinction to be noted between a fact which is warranted to be true and one which is represented to be true, and that is that in the case of a warranty the statement must be true, whether material to the risk or not, and must also be true in fact . . . whereas, in the case of a representation the facts stated although material to the risk, if made in good faith, will not, because the statement is untrue, render the contract which was induced by such statement void or voidable." (Emphasis supplied)

In the present case, the testimony of the Plaintiff and the Defendant emphatically allege that the Defendant was the owner of the automobile, and the Plaintiff, if anything at all, was merely a co-signer for the Defendant (J.A. 43).

Six years after *Commercial Bank, supra,* was decided, the Missouri Supreme Court was called upon to interpret a burglary policy in *Lieberman v. American Bonding & Casualty Co.*, 244 S.W. 102 (1922). In that case, there was a provision whereby the assured stated that he had never sustained any loss by burglary or theft, nor had any burglary or theft insurance policy been declined. A further provision of the policy pointed out that the policy would be void in case of any fraud, misrepresentation or concealment concerning the insurance. The insurer claimed that the policy was void because of the above statements, and the fact that the insured had suffered losses by burglary in 1914, 1915 and 1917. On page 104, the Court, held:

> "But the question in this connection is whether these statements found in the policy are to be treated as representations or as warranties. That, by the terms of the policy, they are representations only, and not warranties, we regard as entirely clear . . . But this portion of the policy shows upon its face that the statements are, by the very terms of the policy, made representations — matters which the insured "represents to be true," and not warranties. Indeed the term "warranty" is no way used in the policy, nor is language used of equivalent import."

After citing *Commercial Bank v. Bonding Co., supra,* the Court continued on page 104 as follows:

> "The policy, indeed, does not undertake to forfeit the insurance, as for the falsity of any of these 'statements,' in the absence of 'fraud or misrepresentation or concealment.' "

This latter statement by the Court is extremely important. It tends to show that aside from refusing to void a policy because of improper notice unless there is a forfeiture clause, that the Missouri Courts appear to refuse a forefeiture of an insurance policy for fraud, misrepresentation or concealment where the same are representations, unless

there is a forfeiture clause. Of course, in the present case, there is no forfeiture clause in the policy (J.A. 61-67).

Having discussed a bonding case and a burglary case, it is now well to move on into the automobile liability insurance area.

Though there does not appear to be any early specific Missouri cases on the effect of a misrepresentation on the ownership of an automobile in applying for automobile liability insurance, nevertheless, cases of this nature appear in other jurisdictions. One of the earlier cases appears to be an Indiana case, *Mercer Casualty Co. of Celina, Ohio v. Kreamer*, 11 N.E.2d 84 (1937). In that case, the facts showed that the automobile was paid by one Graber, though put in the name of Macey, Graber's fiancee. After pointing out that a policy for liability insurance was unlike a policy for fire insurance or on property in general, the Court held that the insurance company was liable under the policy which was issued to Macey. On page 85, the Court stated:

> "[A]ppellant waived the condition of sole and unconditional ownership by virtue of . . . and by a failure on the part of Appellant to rescind the policy and tender back the premium."

The Court further concluded that there was no additional hazard because the policy covered anyone assured permitted to drive the automobile under the "omnibus" clause.

A later Nebraska case was *Hawkeye Cas. Co. v. Stoker*, 48 N.W.2d 623. The Court, on page 628, cited the case of *Abraham v. Hartford Fire Ins. Co.*, 215 Iowa 1, 244 N.W. 675, as follows:

> "The Iowa Court in the Abraham case held that there was a dispute as to true ownership between one who claimed to be the owner and an insurance company defending on the ground of lack of sole ownership against liability for loss on account of theft of the automobile, the question of ownership was one of fact for a Jury."

The Court in *Hawkeye Cas. Co. v. Stoker, supra,* was faced with the situation where both Mr. Stoker and Mrs. Stoker gave written statements to the effect that they believed the car to belong to Mr. Stoker; whereas, the testimony at the trial was that both believed the automobile to belong to Mrs. Stoker. Though the Stokers admitted the signing of the two documents, the Court nevertheless, held on page 629:

> "They however testified to the surrounding facts and circumstances which together with their positive testimony as to ownership was sufficient to present to a jury a controverted question of fact as to ownership." (emphasis supplied).

Assuming that the Plaintiff did sign papers for the Defendant, in the instant case, it once again becomes a jury question as to the effect of the signing of these papers. A case in point is *United States Casualty Co. v. Bain,* 191 Va. 717, 62 S.E. 2d 814 (1951). In that case, the title was actually in the name of Sorey, whereas the insurance was in a different name. The Court, on page 815, held:

> "The title certificate was not conclusive of ownership but only *prima facie* and we think that it was clearly shown that the Trant Company was the sole owner."

In viewing the law directly concerning the present case, it is noted that the Plaintiff alledgedly swore to the fact that she was the joint owner in the complaint originally filed. (J.A. 2). When confronted with this at trial, the Plaintiff acknowledged her signature, but, after stating that she never believed the car to be jointly owned, further stated that she did not recall all of the words, and was not familiar with them (J.A. 28). It is to be noted that oft times a client signs papers presented to him by his attorney without reading them or understanding their legal effects (J.A. 24). However, it would appear from *Churchman et al. v. Ingram et al.,* 56 S.2d 297 (1952), a Louisiana case, that the Complaint signed by the Plaintiff was not fatal. In that

case, Mr. Ingram purchased an automobile, titled it in his name, and obtained insurance in his name. He then gave the automobile to his son. After an accident took place, both the father and son by deposition, under oath, admitted ownership in the son. However, the Court stated on page 303 as follows:

> 'In answer to this we simply point out that the determination of ownership is a conclusion of law which must be based upon established facts. Neither of the Ingrams were qualified to determine this proposition . . ."

Therefore, in the present case, it would appear that the statement in the Complaint, which was signed and notarized, would not prove fatal to the Plaintiff's case.

The general trend of the later cases appears to show that an automobile liability policy differs from a fire, health and accident or life insurance policy. A case in point is *Tyrnauer v. Travelers Ins. Co.*, 223 N.Y.S. 2d 151 (1961). Here the Defendant issued a policy to the Plaintiff. The Plaintiff subsequently transferred the automobile to a charitable corporation. No notice of this transfer was given to the insurance company, which now disclaimed because the Plaintiff was no longer the owner of the automobile. The policy in question, among otherprovisions, had the provisions that the Plaintiff was the sole owner except, and there were no exceptions; and that the insured's declarations were the representations; and that the policy was issued thereon. The Court held that the insurance company was liable because the Plaintiff had an insurable interest as to third parties for injury. It was also held that the transfer of ownership without the knowledge of the insurance company was not a material breach. The Court went on to quote from Blashfield's Cyclopedia of Automobile Law and Practice (Perm.ed. Volume 6) § 3873, P. 538, on page 156 as follows:

> " 'The rule requiring possession by the insured of an insurable interest in the property forming the subject

matter of the insurance, which prevails generally in casualty insurance, is not applicable to liability and indemnity policies."

" 'The character of the insurance is quite different from insurance, against injury or loss, of the property insured by fire, theft, collision or the like where the insured is required to have some real interest in the property insured; in the case of liability insurance the risk and hazard insured against is not the injury or loss of the property named in the policy, but against loss and injury caused by the use of the property therein named, for which the insured might be liable, and the right of the insured to recover does not depend upon his being the holder, in fact, of either legal or equitable title or interest in the property, but whether he is primarily charged at law or in equity with an obligation for which he is liable.' "

Taking the *Tyrnauer* case, *supra*, into consideration, the analogy might arise that even if the automobile was jointly held, the Defendant had an insurable interest since the insurance was to cover her for all amounts which she might be liable to third persons.

One of the most important factors concerning the entire case appears to be the question of the premium paid by the Defendant to the Garnishee. Missouri appears to be very definite in this situation, and in *Gosnell v. Camden Fire Ins. Ass'n.*, 109 S.W.2d 59, the Court on page 65 said:

> "Before a Defendant may make such a defense as that of misrepresentation or breach of warranty, it must not only have pleaded the same but must have tendered back the unearned premiums and kept such tender goods."

Another case in point is that of *Thomas v. American Automobile Underwriters Agency, Inc.*, 5 S.W.2d 660, where the Court said on page 661:

> "It appears to be recognized as a general rule that a return of the premium is not essential to the avoidance of an insurance contract, nor is its mere retention a waiver, especially where the insured was guilty of fraud in obtaining the insurance. But the rule is otherwise where the ground of avoidance goes to the root of the whole insurance contract and avoids it from the beginning, so that no risk ever attached, and where there was no fraud in obtaining the insurance."

See also 45 C.J.S., Insurance, §716, where the general rule is set out on page 696, as follows:

> "Insurer is precluded from asserting a forefeiture where, after acquiring knowledge of the facts constituting a breach of condition, it has retained the unearned portion of the premium or has failed to return or tender it back with reasonable promptness, especially where the nature of the breach are ground for forfeiture is of such character as to render the policy voided from its inception . . ."

The trial court appears to have placed great weight on the fact that the Defendant at one time signed a statement, never introduced into evidence, to the purported effect that she had not reported the accident because (1) the car was jointly owned and (2) she thought the military was going to report it. (J.A. 51) However, this was a statement written out by an adjustor for the Garnishee and merely signed by the Defendant. The Defendant repudiated this statement in court, declaring that she was the sole owner and that the Plaintiff was merely a co-signer (J.A. 49). At this point, it would appear as though a jury question had definitely been presented, i.e., whether or not the Defendant was in fact the sole owner of the automobile.

A situation closely analogous to the one here presented arose in *Kelso v. Kelso,* 306 S.W.2d 534 (1957). Just as in the present case, this late Missouri case concerned a garnishment proceeding, after a default judgment. The Plaintiff, Earl Kelso, obtained a default judgment

against his brother, William Kelso. The Garnishee contended that the liability was excluded under the policy provisions for three reasons. However, before commenting on the grounds alleged by the Garnishee, the court in setting out the basic burden of proof in a garnishment proceeding made the following comment on page 536:

> "[I]n the instant case, where Garnishee seeks to escape coverage solely because of policy exclusions, the burden was upon it to prove facts which would make those provisions applicable."

The first contention raised by the Garnishee in the *Kelso* case, *supra*, was that the policy did not apply to members of the insured's household. The Plaintiff himself had given to the Garnishee two separate written statements to the effect that he and his brother lived in the same household. Also, the Defendant gave a written statement to the same effect. However, the Court noted that the Plaintiff and two other witnesses gave positive, affirmative testimony at the time of trial that the brothers did not reside in the same household. The Court further found that there was no testimony to the contrary and that there was nothing to indicate that the testimony was not truthful.

The second contention of the Garnishee in the *Kelso* case, was the fact that the automobile was jointly held by both brothers. It was admitted that both brothers paid one-half each for the automobile in question. However, the Court looked to the certificate of ownership and registration in order to find that the title was solely in the Defendant.

Thirdly, the Court decided that a default judgment was an actual trial in accordance with the provisions of the policy that suit would not be brought against the Company until a final judgment had been determined after actual trial.

Bringing the *Kelso* case, *supra*, and the holdings therein to the present case, we once again find that the signing of statements does not, as a matter of law, warrant a trial court to grant a Garnishee a directed

verdict at the close of the Plaintiff's case, especially when the statement was never introduced into evidence. The testimony elicited at the time of trial must be considered by the jury, and the jury must decide as a matter of fact which of the conflicting situations they deem the actual facts of the case. The Garnishee further tried to show a joint ownership by other papers, which were not introduced into evidence, that the Plaintiff and Defendant were joint owners of the automobile in question (J.A. 24-25). These papers were admittedly signed in blank and it might just as easily have been a reasonable conclusion by the jury as the trier of the fact, that these papers were signed by the Plaintiff as a co-signer for the benefit of the Defendant with reference to the financing of the new car.

Since this was an attempt to escape coverage on the basis of a policy exclusion, it is felt that the Garnishee did not meet the requirement of showing, as a matter of law, that there was joint ownership.

See also the Missouri case of *Cowell v. Employers' Indemnity Corporation*, 34 S.W.2d 705, where the insurance company attempted to use a misrepresentation of the insured as a defense. Though the court found that there was a positive misrepresentation of a material fact, nevertheless, the court rejected this defense because of the lack of a forfeiture clause in the policy.

It is deemed unnecessary to further present any argument on the facts concerning the alleged misrepresentation. It is sufficient to state that under all of the evidence, there were two available conclusions, thereby raising a jury question. The jury could have either found that the automobile was solely owned by the Defendant, or that there was, in fact, joint ownership. If the jury had found the latter, the Court would have had to construe the policy most strictly against the insurer. See *Giokaris v. Kincaid*, 331 S.W.2d 633 (1960, Mo.), where the Court at page 641 held as follows:

> "[I]nsurance policies are to be construed, if reasonably possible, to accomplish the designated protection, and provisions of voiding liability on the coverage afforded are construed most strictly against the insurer. . ."

Since the policy itself (J.A. 64, par. 20) specifically calls the conditions representations of the Defendant, and not warranties, and since there was no forfeiture clause, the Court below erred in granting the Garnishee's motion for a directed verdict at the end of the Plaintiff's case, especially when there was no testimony to the fact that the Defendant tendered back the unearned premiums. *Commercial Bank v. American Bonding Company, supra; Lieberman v. American Bonding & Casualty Co., supra; Gosnell v. Camden Fire Ins. Ass'n., supra.*

The Defendant had an insurable interest, insured this interest to protect third persons, and was the actual driver at the time of the accident. To conclude, as the trial court did, that there was a misrepresentation which was material to the risk, can hardly be substantiated when taking into account the Missouri law and the policy itself, especially in lieu of the "omnibus" clause in the policy itself (J.A. 61, Persons Insured).

CONCLUSION

In conclusion, and in view of the foregoing authorities and argument, it is respectfully submitted that the Court below erred in granting the Garnishee's motion for a directed verdict at the close of the Plaintiff's case; and that the decision of the District Court should be reversed and the case remanded with instructions to grant a new trial.

Respectfully submitted

LEONARD Z. BULMAN

750 Washington Building
Washington 5, D. C.

Attorney for Appellant

December, 1965

JOINT APPENDIX

TABLE OF CONTENTS

[Filed August 15, 1958]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EDYTHE F. WATERS,
Walter Reed Army Medical Center,
Ward 14,
Washington, D. C.
Plaintiff

vs.

DORIS V. OSBORNE,
1708 - 16th Street, N. W.,
Washington, D. C.
Defendant

CIVIL ACTION NO. 2116-58

COMPLAINT

PERSONAL INJURIES

1. Jurisdiction of this Court is founded on Title 11, Sections 301, et seq., District of Columbia Code (1951 Edition).

2. Plaintiff is an adult citizen of the United States and presently confined to Walter Reed Army Medical Center, Washington, D. C. Defendant is an adult citizen of the United States and resides at 1708 - 16th Street, Northwest, Washington, D. C.; the automobile herein concerned was jointly owned by the plaintiff and defendant.

3. On, to wit, September 7, 1957, with plaintiff as a passenger, defendant was driving the said automobile on highway #76 in an easterly direction in a careless, negligent and reckless manner in that defendant drove the automobile at an excessive rate of speed failing to keep said automobile under control and on the highway and at a place approximately one (1) mile west of Florence, South Carolina caused said automobile to leave the highway and collide with a guardrail to a bridge which was part of the highway aforesaid.

4. That as a result of this impact plaintiff suffered multiple severe, permanent physical injuries namely, compression fractures of the bodies of D-7, L-1 and L-3 vertebrae, fracture of right ankle, non-displaced fracture of right shoulder and fracture of the midshaft of the left femur, fracture of the sternum, fracture of the left ischial and pubic rami and multiple lacerations of the left leg.

5. As a result of said injuries plaintiff has suffered, continues to suffer and in the future will suffer great pain and anguish and plaintiff has been permanently injured and plaintiff has incurred and will in the future permanently incur large expense for medical treatment, hospitalization, nursing care and medicines and, as a result of said injuries plaintiff lost much time from her employment, all to the detriment of plaintiff in the sum of $250,000.00

WHEREFORE the plaintiff demands judgment against the defendant in the sum of $250,000.00, and demands trial of the issues herein by jury.

/s/ Edythe F. Waters
Plaintiff

KILEY, NILES, BLONDES & CONNELLY
By: /s/ J. Ambrose Kiley

/s/ Leonard S. Blondes
Attorneys for Plaintiff

STATE OF MARYLAND)
COUNTY OF MONTGOMERY) ss.

I HEREBY CERTIFY, That on this 31st day of July, 1958, before me, the subscriber, a Notary Public of the State and County aforesaid, personally appeared Edythe F. Waters, and made oath in due form of law that the matters and facts set forth in the foregoing Complaint are true to the best of her knowledge, information and belief.

AS WITNESS my hand and Notarial Seal.

(SEAL)

/s/ Helen D. Shell
Notary Public

My commission expires May 4th, 1959

[Filed April 16, 1959]

DEFAULT

It appearing that the above-named defendant has failed to plead or otherwise defend this action though duly served with summons and copy of the complaint on the 12th day of December, 1958, and an affidavit on behalf of the plaintiff having been filed, it is this 16th day of April, 1959 declared that DORIS V. OSBORNE defendant herein is in default.

HARRY M. HULL, Clerk,

By: /s/ Stephen A. Trimble
Deputy Clerk.

[Filed July 3, 1959]

JUDGMENT

This case standing ready for hearing and a default having been entered for failure of the defendant to answer, the Court, on inquisition, finds as facts that the plaintiff, a woman now 24 years old, unmarried, was injured in an automobile operated by the defendant on September 7, 1957, near Florence, South Carolina; that said injuries were grievous and permanent and disfiguring; that at the time of the injuries plaintiff was a member of the Womens Army Corps; that said injuries would interfere with promotion should plaintiff be recalled to service; that said injuries would interfere with plaintiff obtaining full-time employment in the future.

The Court concludes as a matter of law that the plaintiff is entitled to judgment.

It is, thereupon, this 3rd day of July, 1959,

ORDERED that judgment be entered herein in favor of plaintiff against the defendant in the sum of $100,000.00 and costs, with interest from date of judgment.

/s/ R. B. KEECH
Judge

[Filed August 19, 1960]

ATTACHMENT ON JUDGMENT

The President of the United States, to the Marshall for said District — GREETING:

YOU ARE HEREBY COMMANDED to attach the goods, chattels, and credits of the defendant, if to be found in this District, of value sufficient to satisfy the plaintiff judgment against the defendant in this Court in the above-entitled cause, on the 3rd day of July, 1959, for $100,000.00 with interest from July 3, 1959 for money payable to the plaintiff by the defendant, and $.....for costs; and the same so attached, safely keep and have before said Court, on or before the tenth day occurring after the execution of this writ, that the same may be condemned unless sufficient cause be shown to the contrary; and, if said goods, chattels, or credits be attached in the hands or possession of any person or persons other than the defendant, notify such person or persons of such seizure, and warn him or them to appear before said Court, within the time aforesaid, to show cause why the same should not be condemned and execution thereof had according to law, unless the credits so attached are wages as defined by Public Law 130, signed August 4, 1959, in which event the terms of the said Law must be observed. And have then there this writ, so endorsed as to show when and how you have executed it.

Received August 19, 1960
11:24
U. S. Marshal

WITNESS, The Honorable Chief Judge of said Court the 19th day of August, 1960

HARRY M. HULL, Clerk

By: /s/ Stephen Trimble
Deputy Clerk.

NOTICE

To American Automobile Insurance Company, Garnishee, 425 - 13th Street, N. W., Washington D. C.

YOU ARE HEREBY NOTIFIED that any property or credits of Doris V. Osborne, your insured under policy no. A 168 6119 in your hands are seized by virtue of the foregoing writ of attachment, and you are hereby warned to appear in said Court, on or before the tenth day after service hereof, and show cause, if any there be, why the property or credits so attached should not be condemned and execution thereof had, unless the credits hereby attached are wages as defined by Public Law 130, signed August 4, 1959, in which event you are admonished to comply with the terms of that Law. A copy of the referred to Law may be obtained from the Clerk of this Court upon request.

DUDLEY G. SKINNER
U. S. Marshal

/s/ J. Anderson
Deputy U. S. Marshal

MARSHAL'S RETURN

Attached credits in the hands of_____and served _____with copies of this Writ, Interrogatories, and Notices as Garnishee of Defendant

/s/ J. Ambrose Kiley
8710 Georgia Avenue
Silver Spring, Maryland
Attorney for Plaintiff

_____
U. S. Marshal in and for the
District of Columbia

[Filed August 19, 1960]

INTERROGATORIES IN ATTACHMENT

NOTICE

To American Automobile Insurance Company, Garnishee; 425 - 13th Street, N. W., Washington, D. C.

You are required to answer the following interrogatories, under Penalties of Perjury within ten days after service hereof. And should you neglect or refuse so to do, judgment may be entered against you for an amount sufficient to pay the plaintiff's claim, with interest and costs of suit.

/s/ J. Ambrose Kiley
Attorney for Plaintiff

INTERROGATORIES

1st. Were you at the time of the service of the writ of attachment served herewith, or have you been, between the time of such service and the filing of your answer to this interrogatory, indebted to the defendant? If so, how, and in what amount?

ANSWER: No

2nd. Had you, at the time of the service of the writ of attachment, served herewith, or have you had, between the time of such service and the filing of your answer to this interrogatory, any goods, chattels, or credits of the defendant in your possession or charge? If so, what?

ANSWER: No

I declare under the penalties of perjury that the answers to the above interrogatories are, to the best of my knowledge and belief, true and correct as to every material matter.

/s/ RICHARD HARBAGERG
Claims Supervisor

Signed this 26th day of August, A.D. 1960.

/s/ Eileen Feihan

My Commission Expires December 14, 1964

[Filed October 25, 1960]

TRAVERSE OF ANSWERS TO INTERROGATORIES BY GARNISHEE

The plaintiff traverses the answers to interrogatories by the garnishee herein, American Automobile Insurance Company, and states that on July 3, 1959, plaintiff was awarded a judgment against the defendant, Doris V. Osborne, in the sum of $100,000.00, with costs and interest from date of judgment; that defendant Osborne was an insured under a policy of liability insurance, Policy No. A-168 6119, issued to here by the American Automobile Insurance Company, garnishee herein; that by the provisions of such policy of insurance, the American Automobile Insurance Company agreed with the insured to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, personal injury sustained by any person; that said policy of insurance was in full force and effect at the time of the accident which gave rise to the personal bodily injuries sustained by the plaintiff; that said American Automobile Insurance Company breached its policy and negligently failed to defend and/or settle the within case within the limits of the policy aforesaid; that said American Automobile Insurance Company consistently denied liability and/or coverage under the terms of the policy aforesaid and rebuffed plaintiff's efforts and offers to negotiate settlement of her claim.

Plaintiff is ready to prove the foregoing allegations and demands

a jury trial of the liability of the American Automobile Insurance Company, defendant's insurer herein.

/s/ J. Ambrose Kiley
Attorney for Plaintiff

[Filed May 14, 1965]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 12th day of May, 1965, before the Court and a jury of good and lawful persons of this district, to wit:

Mrs. Esther J. Flowers	Mrs. LaFrances T. Doffett
Mrs. Elizabeth S. Lewis	Edwin D. Goldfield
John H. McAuley	Mrs. Georgiana R. Ramsey
William G. Wyles	Miss Helena A. Higgins
Paul A. Foster	Mrs. Sylvia S. Ingram
Miss Nancy E. Higgins	Mrs. Alma E. Green

who, after having been duly sworn to well and truly try the issues between EDYTHE F. WATERS, plaintiff and the AMERICAN AUTOMOBILE INSURANCE COMPANY garnishee, and after this cause is heard and given to the jury in charge, they upon their oath say this 14th day of May, 1965, that they find for the garnishee against said plaintiff by direction of the Court.

Wherefore, it is adjudged that said plaintiff take nothing by this action, that said garnishee go hence without day, be for nothing held and recover of plaintiff their costs of defense.

HARRY M. HULL, Clerk,

By: /s/ James P. Capitanio
Deputy Clerk.

Judge Richmond B. Keech
Presiding

[Filed May 24, 1965]

MOTION FOR NEW TRIAL

EDYTHE F. WATERS, Plaintiff, by J. AMBROSE KILEY, her attorney, in the action against DORIS V. OSBORNE, Defendant, and AMERICAN AUTOMOBILE INSURANCE, Garnishee, pursuant to Rule 59 of the Federal Rules of Civil Procedure, moves the Court to grant to her a new trial in the above-entitled case, and for reasons says:

1. On the basis of the evidence at the close of the Plaintiff's case, this Honorable Court entered a verdict for the Garnishee.

2. That said verdict was against the weight of the evidence.

3. That said verdict was against the evidence.

4. That said verdict was against the weight of the law.

5. That there is now newly discovered evidence, namely, the name, address and location of the first attorney who was retained by EDYTHE F. WATERS, the Plaintiff hereto.

6. That this Honorable Court granted the directed verdict of the Garnishee based upon the law submitted by the attorney for the Garnishee, which law is not applicable under the Laws of the State of Missouri.

7. That the insurance policy, contract, home office of the insurance company, the agent for the insurance company and the Defendant, DORIS V. OSBORNE, were all within the State of Missouri, thereby making applicable the Laws under the State of Missouri.

8. That there is newly discovered law, whereby the Laws of the State of Missouri appear to require prejudice by the Garnishee in order for the said Garnishee to disclaim because of lack of notice and other reasons.

9. That there was no showing of the Garnishee of any prejudice caused to it by lack of notice, or any other reason, thereby making the granted directed verdict against the weight of the evidence.

10. That there is no forfeiture clause in the said policy, which is

also required under the Missouri Law in order for the Garnishee to disclaim because of lack of notice, and other reasons.

11. And for such other reasons to be made known at the time of the hearing hereon, which is requested, and in advance of which a memorandum will be filed.

/s/ J. Ambrose Kiley
Attorney for Plaintiff

[Certificate of Service, dated May 24, 1965.]

[Filed May 26, 1965]

OPPOSITION TO MOTION FOR NEW TRIAL

Comes now American Automobile Insurance Company, Garnishee, by and through its Attorneys of Record, and as Opposition to the Motion for New Trial filed by Plaintiff herein, states as follows:

1. The direction of verdict by the Court was not against the evidence or the weight of the evidence and was not against the law.

2. The name of the first Attorney retained by the Plaintiff herein is not newly discovered evidence. This evidence was within the Plaintiff's Attorney's knowledge or power to secure ever since 1958. There is no showing of what the testimony of the first attorney would be and whether the testimony would change the facts in any way.

3. There is no evidence of any "newly discovered law". The Law of the State of Missouri should have been well known to the Plaintiff's Attorney before the case was tried, and indeed, it was set forth in Page 16 of the Trial Brief of the Law submitted by Garnishee herein.

4. For such other and further reasons which may be apparent of record.

BRAULT, GRAHAM, SCOTT & BRAULT

By: /s/ Denver H. Graham
Attorneys for Garnishee

[Certificate of Service, dated May 26, 1965.]

[Filed June 14, 1965]

ORDER

Upon consideration of the Motion for New Trial filed by Plaintiff herein and the Opposition to Motion to New Trial filed by Garnishee, it is by the Court this 14th day of June, 1965;

ORDERED, that the Motion for New Trial be, and the same hereby is denied.

/s/ RICHMOND B. KEECH
Judge

[Certificate of Service, dated June 10, 1965.]

[Filed July 14, 1965]

NOTICE OF APPEAL

Notice is hereby given that Edythe F. Waters, Plaintiff in the above-entitled case, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the ORDER of the United States District Court for the District of Columbia granting the Directed Verdict for the Garnishee, entered in this action on May 14, 1965.

/s/ LEONARD Z. BULMAN
Attorney for Plaintiff

[Certificate of Service, dated July 14, 1965.]

[Excerpts from Proceedings before Honorable Richmond B. Keech, at Washington, D. C., May 12, 1965.]

[3] EDITH WATERS

was called to the stand on behalf of the Plaintiff, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KILEY:

Q. Now, Miss Waters, when you answer my questions, be sure you keep your voice sufficiently loud so that the members of the jury and His Honor and counsel can hear you.

Will you give the court and jury your name and address? A. My name is Edith Waters. 1225 North Pierce Street, Arlington, Virginia.

Q. Now, how old are you? A. 29.

Q. And you are the same Edith Waters that is plaintiff in this case all the way through? A. Yes, I am.

Q. Do you know Doris Osborne? A. Yes, I do.

[4] Q. How long have you known her? A. Oh, a period of about 9 and a half years now.

Q. Now, were you at Fort McClellan with Miss Osborne? A. No, I was not.

Q. You were in the WACS with her? A. Yes, I was.

Q. And she is -- has been a long time friend of yours? A. Yes, that is true.

Q. Now, when you were stationed in Georgia, did you know Miss Osborne at that time? A. Yes, I did.

Q. Was she stationed there, also? A. She was stationed at Fort McPherson as I was.

Q. At the same time you were? A. Yes.

* * *

[5] Q. Did you go to the salesroom with Miss Osborne to buy that car?

A. I don't know whether I was in the salesroom. I was at Nalley Chevrolet.

Q. What was the purpose of going there? A. Well, I went along the first time she went out to look at cars just to go along with her.

Q. And did Miss Osborne decide on a car? A. Yes, she did.

Q. Now, at that time, what was Miss Osborne's rank? A. I believe it was priviate or either private first class. I don't know which.

[6] Q. What was your rank? A. I was a specialist fourth, or an E-4.

Q. What was the last you said? A. Or an E-4. I think it is the same.

Q. Would that in the military be a rank above Miss Osborne? A. Yes, it would be a Corporal. Equivalent to a Corporal.

* * *

Q. Now, in the course of Miss Osborne's buying that automobile, did you have occasion to sign certain papers in connection with her?

A. Yes, I signed some papers.

Q. And what were they? Do you recall?

MR. GRAHAM: Your Honor, the papers would speak better for themselves.

THE COURT: Will you do that, Mr. Kiley?

MR. KILEY: Well, I just asked her --

THE COURT: She said yes.

MR. KILEY: All right.

* * *

[7] BY MR. KILEY:

Q. Now, after the '57 Chevrolet was delivered to Miss Osborne, she drove it from the place? A. Yes.

Q. Did you have a set of keys to the car? A. No, I didn't.

Q. Did you ever use it? A. Not that I can recall. I might have driven it some time or other but I can't recall.

Q. Did you ever use it without Miss Osborne's permission? A. No.

Q. And you can't recall whether you ever used it on business of your own? A. Probably would not have been business because I [8] didn't have any business in Atlanta, Georgia.

THE COURT: I think counsel means for your own use as distinguished from other business or pleasure.

THE WITNESS: No, I didn't.

BY MR. KILEY:

Q. Was this car fully paid for or was it financed? A. It was financed.

Q. Did you make any payments on the car out of your own funds? A. No, I didn't.

Q. Did you make any application for insurance on the car? A. No, I didn't.

Q. Did there come a time thereafter when the car was wrecked? A. Yes.

Q. And at that time you were a passenger in it? A. That's right.

Q. Now, as a result of the injuries as indicated by Mr. Graham, you spent a long time in the hospital? A. Yes, I did.

Q. How long did you spend in the hospital? [9] A. About 440 days or approximately a year and three months, I believe.

Q. Now, when you were in the hospital that year and a few months, did Miss Osborne visit you? A. Yes, she did.

Q. Did she visit frequently? A. She would visit maybe once a week.

Q. Did she -- A. When she was off on a week end. I believe at the time she was working at night.

* * *

Q. Did you at any time indicate to Miss Osborne that you were going to sue her? A. I did tell her that, yes.

Q. And you did in fact file suit? A. Yes, I did.

Q. Now, at the time that suit was filed, where were you living?

A. It's been a long time. I believe I was still in the hospital at the time the suit was filed or did I retain the [10] lawyer then?

Q. Now, when you started considering suit against Miss Osborne, did you retain a lawyer? A. Yes, I did.

* * *

Q. Now, how did you come to meet Mr. Rosenthal? A. He and Miss Osborne visited me in the hospital at Walter Reed on Sunday afternoon, I believe it was. During the week end they came to visit me.

Q. Now, Miss Osborne brought Mr. Rosenthal to Walter Reed? A. Yes, she did.

Q. Did she bring him for the purpose of having you retain him as a lawyer? A. Not to my knowledge she didn't.

[11] Q. When was -- and thereafter, what, if anything, happened insofar as it affected Mr. Rosenthal? A. Well, there was -- that was the first time I knew he was a lawyer and I mentioned the fact that I had retained a lawyer and that it had been a considerable length of time, and I didn't feel that he was doing too much about it, the case, and so we discussed it a little at length at that time but he indicated to me that since I had a lawyer, you know, he wouldn't be able to do anything or -- in connection with it for me.

THE COURT: I am not sure that I understood that, Mr. Kiley.

Did you say: Did you discuss your case with Mr. Rosenthal at the hospital when he and Miss Osborne came?

THE WITNESS: Yes.

THE COURT: Then did you say that you told him that you had a lawyer?

THE WITNESS: Yes.

THE COURT: Then I missed what you said after that.

THE WITNESS: I said that he sort of indicated to me that he wouldn't be able to help me out.

THE COURT: Who is he?

THE WITNESS: Mr. Rosenthal.

* * *

[12] BY MR. KILEY:

Q. Have you ever conferred with Miss Osborne concerning the progress of your suit? A. I have at times mentioned something about my suing you.

Q. And you are still friendly with her? A. Yes, I am friendly with Miss Osborne.

* * *

[13] Q. Now, you will recall in his address to the jury or his opening statement to the jury that Mr. Graham indicated that in the declaration, and properly so, that we allege that the car in which you were injured was jointly owned. Can you account for that in any fashion?

MR. GRAHAM: I object to that, Your Honor. The complaint speaks for itself.

THE COURT: I don't think it is a question of accounting for that, sir. I think that is in evidence, and her statement that it wasn't jointly owned. If that is a fact, it will be for the jury to determine.

MR. KILEY: All right, sir.

THE COURT: Ladies and Gentlemen, you are the ultimate judges of the facts, and not counsel and not the court.

BY MR. KILEY:

Q. Now, at any time during the period the 1957 Chevrolet was in use, did you have any interest in it? A. No, I didn't.

Q. You had no insurance on it? A. No, I didn't.

Q. You made no payments on it? [14] A. No, I didn't make any payments.

Q. Were you aware that Miss Osborne had collision coverage with one company and liability coverage with another company? A. No, I didn't know that -- know what type of insurance she had.

* * *

Q. Now, have you made or have you authorized your counsel to make any attempts at collecting this judgment from Miss Osborne? A. I don't understand.

Q. You have a judgment of $100,000 against Miss Osborne. Have you made any attempts to collect this judgment from [15] Miss Osborne? A. No.

Q. Do you have any reason why?

* * *

[16] CROSS EXAMINATION

BY MR. GRAHAM:

Q. Miss Waters, in addition to the name Edith, do you also have another name by which you are known? A. Yes.

Q. What is that? A. Judy.

Q. Now, where did you first meet Doris Osborne? A. Fort McPherson, Georgia.

Q. And how long did you know her before the accident occurred? A. Maybe a year and a half approximately.

Q. During that period of time, at any time did you know that she was under some investigation by the Armed Forces? A. Everyone in the WAC detachment was.

Q. Had you been questioned about your relationship with Miss Osborne? A. As was everyone in the detachment.

Q. Is the answer that you had been questioned? [17] A. Yes.

Q. And then you told the jury that you were in the hospital for 400 days or so, and you were not confined to the hospital 24 hours a day during that period, were you? A. Not the first -- for about 8 months I was in bed, and then I was allowed in a wheelchair and then to a cane and crutches.

Q. Now, where did this accident occur? A. In South Carolina.

Q. And where were you going at the time the accident occurred? A. We were going to Swansboro, North Carolina which was my home.

Q. From Atlanta, Georgia? A. Yes.

Q. Was that on a week end pass? A. Yes.

* * *

[18] Q. And then after the accident happened, were you taken by ambulance somewhere? A. I would assume so but that would be hearsay, I think, because I don't know.

Q. What hospital did you go to? A. From there -- McCloud Infirmary.

* * *

Q. Did you see Miss Osborne there? A. I don't remember for sure if I did or not.

Q. Were you then transferred there to an Army Hospital somewhere? A. A month after, I think, they took me off the critical list and then they came by ambulance and took me to a hospital in [19] Columbia, a military hospital.

Q. A military hospital in Columbia. Was that Fort Jackson? A. Yes, I believe so.

Q. Where was Miss Waters? Where did she go? A. I am Miss Waters.

Q. I mean Miss Osborne. Where did she go? A. I think she was probably in the hospital in Fort McPherson.

Q. Did she come to visit you while you were in Fort Jackson? A. She made, I believe, one trip there.

Q. When you transferred from Fort Jackson, where did you go? A. I went to Fort Bragg.

Q. Is that at Fayetteville, North Carolina? A. Or in the area.

Q. Or in the area, right, and did Miss Osborne visit you there? A. Yes, she did.

Q. And then you were transferred to Walter Reed? A. Yes, I was.

[20] Q. Where was Miss Osborne's home? A. St. Louis, I believe or in that area.

Q. Miss Osborne was discharged from the WACS while you were up at Walter Reed, wasn't she? A. I think so.

* * *

Q. And then did she take an apartment near Walter Reed? A. I believe it was some place on 16th Street.

Q. How far from Walter Reed? A. I really don't know. I am not too good at mileage, if you mean miles.

Q. And did you used to visit her at that apartment and spend week ends with her there? A. I was out on pass and I went over, yes.

Q. Did you spend a week end with her? A. I did.

[21] Q. During that period of time, was she working somewhere? A. Yes.

Q. Near by in the District? A. Yes.

Q. Where was she working? A. At IBM, I believe.

* * *

Q. Now, then there came a time when Miss Osborne brought Mr. Rosenthal to the hospital, is that correct? A. That is correct.

Q. And you met Mr. Rosenthal for the first time? A. That is correct.

Q. And you retained him to represent you, is that correct? [22] A. Thereafter.

Q. Was that when you decided to sue Miss Osborne? A. No, sir. I had already had a lawyer before, as I said.

Q. Do you recall, Miss Waters, being in my office on May 15, 1961, with Mr. Kiley, your attorney, to give testimony under oath at a deposition? A. I was in the office at one time.

Q. Do you recall being asked these questions and giving these answers at page 22, Your Honor.

THE COURT: Thank you.

BY MR. GRAHAM:

Q. "Q. Did Miss Osborne bring Mr. Rosenthal around to introduce you?

"A. Yes.

"Q. Was it then that you retained the attorney?

"A. Yes.

"Q. Was it then that you decided to bring your action against Miss Osborne?

"A. Yes."

Do you recall giving those answers to those questions? A. I don't remember the questions that you asked me in 1961.

Q. Was your recollection of this occurrence better in [23] 1961 than it is today? A. No, sir.

* * *

Q. Did Miss Osborne bring Mr. Rosenthal to introduce you? A. We were introduced the first time, yes.

Q. So your answer would be yes? A. But not for that specific reason.

Q. Is your answer yes to that question, did Miss Osborne bring Mr. Rosenthal to introduce you? Is your answer yes? A. If you reword it, it would be.

Q. I will ask you this question: Did Miss Osborne bring Mr. Rosenthal around to introduce you? A. Not for that specific reason.

Q. All right. A. We were introduced at that time, yes.

Q. Was it then that you retained the attorney? A. Well, it's a little difficult to say because I -- as [24] I said, I retained him -- maybe not -- maybe not that day but I did retain him.

* * *

Q. Now, who referred you to Mr. Kiley? A. Mr. Rosenthal.

* * *

[25] Q. Now, did there come a time when Miss Osborne gave up her apartment on 16th Street and moved out to Downing Street, Northeast? A. I am sure she did, yes.

Q. How are you sure she did? A. Because I was living there after I was once on the disability list from the Army.

Q. You went out to live with Miss Osborne on Downing Street, is that correct? [26] A. Right.

Q. It was Downing Street -- A. The Army wasn't paying me too much in disability, only about --

THE COURT: The only question is did you go out to live with her?

THE WITNESS: Yes.

BY MR. GRAHAM:

Q. If the Army wasn't paying you too much in disability, who was supporting you? A. Well, the Army was giving me enough to live -- to buy my food and share -- share half the rent.

Q. How much was the rent on that apartment? A. I think it was $80.

Q. And was Miss Osborne helping to support you for that portion above which the Army was paying you? A. The Army, I think, as I said, was paying $97 or maybe $98. I had enough money for rent and food.

* * *

[27] MR. GRAHAM: I have it, Your Honor.

According to the official file of this court, the U. S. Marshal served the summons and complaint upon Doris V. Osborne at Apartment 1053 A, 1400 Downing Street, Northeast on December 12, 1958, at 11:53 a.m.

BY MR. GRAHAM:

Q. Were you present when the suit was served? A. I remember someone coming to the door. I don't know -- I didn't know it was a suit.

Q. You were living there at that time, were you not, with her? A. Yes.

Q. Now, then, what did you do? What conversation did you have with her when the Marshal handed her this suit for a quarter of a million dollars? A. I don't know if he handed it to her. I knew somebody came to the apartment but if he handed it to me, I might have handed it to --

Q. All right. Then what did you say to Miss Osborne and what did she say to you about the suit? A. As I said, I don't recall it being a suit. I don't know if she received it then. I didn't know it was a suit.

[28] Q. Did she ever have any conversation with you saying, Judy, what are you suing me for a quarter of a million dollars for? A. As I said, I told her I was going to do this.

Q. Now, then, in connection with this complaint, did you leave Walter Reed in July and go out to Mr. Kiley's office to sign the complaint before a notary public? A. The complaint?

Q. Yes, the complaint. A. I am not too familiar with --

MR. GRAHAM: May I have this marked? This is a photostatic copy marked as Garnishee's exhibit 1 for identification.

MR. KILEY: No objection.

THE COURT: It will be received.

(Garnishee's exhibit No. 1 was marked for identification and received in evidence.)

BY MR. GRAHAM:

Q. Miss Waters, I have handed you a two page document marked Garnishee's exhibit 1, and I ask you if you can identify the signature which appears on the second page there of that document? A. As my signature?

[29] Q. And where was this paper signed? A. I don't remember this paper. If I might look at it, I might see what it is.

Q. Fine, take your time and read it.

(The witness read the document to herself.)

BY MR. GRAHAM:

Q. Do you recognize that paper now? A. Vaguely. As I said, this was in 1958.

Q. Right. A. I can't.

Q. And this is on the stationery of your attorney, is it not? A. Yes.

Q. And in addition to being signed by you, is it also signed by J. Ambrose Kiley, your attorney? A. Yes.

Q. And did you at the time you signed this, appear before Helen

Shell, a notary Public and swear that the matter set forth in here are true to the best of your knowledge and belief? A. Yes, I guess I did.

Q. Now, would you please, at this time, read to the court and these ladies and gentlemen of the jury paragraph two of that complaint? [30] A. I'm not a good reader. You read it, would you please?

Q. I will let you borrow my glasses if you would like or I will be glad to read it.

Did you at that time, under oath, make the following statement: Plaintiff, that is you, an adult citizen of the United States and presently confined to Walter Reed Army Medical Center, Washington, D. C., Defendant, that is Miss Osborne, an adult citizen of the United States and residing at 1708 16th Street, Northwest, Washington, D. C., the automobile herein concerned was jointly owned by the plaintiff and defendant.

Now, did you swear to the truth of that statement? A. As I said, I don't recall the statements that were made when -- but my -- my signature is on the paper.

Q. And do you now say under oath that the car was not jointly owned by you and Miss Osborne? A. I have never believed it was jointly owned, and I say now that it was not jointly owned.

Q. Who told you to say it was not jointly owned? A. I have always said it was not jointly owned.

As I said, on all of these papers, some times just like depositions that I gave to you, I can't remember all of these papers word for word and the words, I am not familiar with them.

[31] Q. Since you swore under oath that you owned the car, since that time, has someone told you that if it is true, that you and Miss Osborne owned the car jointly, that your case would be thrown out, and you could not make a recovery? A. No one.

Q. You had no discussion with your attorney about the legal facts and conclusions of law in this case? A. We had discussed it to some degree but he hasn't filled me in on all the points.

Q. Has anyone told you that if you and Miss Osborne own this car together that you have no right to recovery? A. No one told me that, no.

Q. And yet under oath today you are denying that you own the car, while under oath when you filed the suit, you alleged that you owned it, is that correct? A. Well, who made the wording on this, Mr. Kiley? Who filed this?

Q. It is on the printed stationery of your attorney, and it is signed by you before a notary public, and signed by Mr. Kiley. Now, I assume it is his wording and yours. A. When I --

Q. Miss Waters, I am going to show --

[32] THE COURT: Do you wish to make a further answer to the question?

THE WITNESS: I would like to say as I said, a lot of these papers are in front of you, and you some times you don't read them as carefully as you should.

* * *

BY MR. GRAHAM:

Q. Now, I am going to show you a piece of paper that has been marked Garnishee's pre trial exhibit No. 2 and ask you if that is your signature at the bottom? A. Yes, it is.

Q. And this piece of paper is on the letterhead of Nalley Chevrolet, Atlanta, Georgia, and it says, buyer's [33] signature, referring to a 1957 Chevrolet, type 1506-6, color ivory and -- what was the other color? A. I don't remember.

Q. Setting forth the total cost of the car, $1621.33, and down here where it says buyer's signature, it is signed by Edith F. Waters which you have identified as your signature and who else signed this other than you under buyer's signature?

Do you recognize the other signature that is there? A. Yes, it is Doris Osborne, above my name and my name is under her name.

* * *

[34] Q. And then there is an exhibit five -- four and five entitled Purchasers statement, both signed in blank, Doris Osborne and then Exhibit five is signed Edith Waters. Is that your signature? A. Yes.

Q. As a matter of fact, the collision insurance, that is, the $50 deductible on this car was carried in your name and in Miss Osborne's name, wasn't it? A. The collision insurance?

Q. Yes. A. Not to my knowledge.

Q. And isn't it a fact that you signed a proof of loss together with Miss Osborne and presented it to the collision insurance company? A. When was this supposed to be?

Q. After the accident. A. When I was on the critical list or after that?

Q. I don't know. A. I don't recall ever it happening and I thought you might refresh my memory.

* * *

[36] Q. "Q. While you were at Fort Bragg did Miss Osborne visit you?

"A. For a few minutes.

"Q. What were the circumstances surrounding that?

"A. Well, I thought that I would be at Fort Bragg for a longer period of time and my family planned to come up, and she was going to come up to see how I was doing there. I think it was to see about the car and make some arrangements as to what she was going to do. I think she said she wanted to get another car and asked me if I would sign to get another car."

Were you asked that question and did you give that answer under oath on May 15, 1961? A. I don't remember the questions of that date.

Q. Does that refresh your recollection as to whether you had any conversation with Miss Osborne about the purchase of a [37] new car? A. Well, if you had asked the same question that you have just now asked I would --

Q. I am sorry. I can't hear you. A. I would try to remember as best I could, and I say, it has been a long time since that deposition, and even now, it has been a longer period.

Q. Does this refresh your recollection? A. No, I don't recall her, as I said, discussing the car with me.

Q. Now, in connection with the purchase of this first car, at Nalley Chevrolet, did you ever send your own money order in to make a payment on that car? A. I don't recall but I do think that I purchased a money order for her at one time.

Q. And you signed it when you purchased it, did you not? A. I am not that familiar with money orders. It has been a long time.

* * *

[38] A. I am sure it is in your deposition.

Q. Now, then, after Miss Osborne was served with this suit paper, the complaint, what did she do with it? A. What did she do with the suit?

Q. Yes. A. Why, I don't know.

Q. Did there come a time when you signed for a registered letter from the insurance company mailing that suit paper back to Miss Osborne? A. I don't know if that is when -- what I signed for or not. It was registered for her and I could have signed it but I don't recall what it was.

Q. This is the company's file and I don't want it disturbed but I would like to have the pink return receipt marked Garnishee's exhibit 2 for identification.

(Garnishee's Exhibit No. 2 was marked for identification.)

BY MR. GRAHAM:

Q. Miss Waters, I show you Garnishee's exhibit 2 for identification which purports to be a return of a registered letter from the Post Office dated January 2, 1959, and ask you if you can identify the signature that appears on there? A. Yes.

[39] Q. And whose signature is that? A. That is my signature.

Q. And how is that signed? A. Judy Waters.

Q. Did you sign Doris Osborne's name up above? A. I am not sure. That is my writing there but it looks like it. This really doesn't look like mine.

Q. You know the Judy Waters is your signature? A. I would -- it looks like mine.

Q. Now, after the insurance company sent the summons and complaint back to Miss Osborne, after you signed the registered letter, did you and Miss Osborne have a conversation then about what was going to happen to this suit? A. I don't recall any conversation we had.

Q. Do you recall the day that you came down here to court to get your judgment? A. Yes, I was here.

Q. Who was living with you at that time? A. If that was still the time I was living in Brentwood Village, I was living -- living with Miss Osborne.

Q. And at that time did you own a car? A. No, I didn't.

[40] Q. Did Miss Osborne own a car? A. She did.

Q. Did she bring you and drop you off at the court house that morning on her way to work? A. I don't recall. I don't remember how I got here.

Q. How did you get to the court house that day you came down to get your judgment against Miss Osborne? A. As I say, I don't remember how I got here. I might have taken a cab or Mr. Kiley might have picked me up but she -- she could have dropped me off. As I said, I don't remember.

Q. And did you tell her that morning, I am going down to get a judgment against you? A. I don't recall telling her anything about it.

Q. Did you discuss with her where you were going that day? A. She probably knew where I was going.

Q. How did she know you were coming down here? A. Well, we lived together.

I wasn't living in a complete mystery about what was going on. She knew she was being sued.

Q. Did she get a lawyer to defend her? A. I don't know.

Q. Was there another lawyer present in court to contest the case?

[41] A. No.

Q. Did you have a jury when you came down for your judgment?

A. No.

Q. Who testified in the case? A. I did.

Q. Anyone else? A. Yes, a doctor.

Q. Just you and the doctor? A. Yes.

Q. And Mr. Kiley was here? A. Yes.

Q. Was Miss Osborne in - sitting in the court room over at a table? A. No.

Q. Was her lawyer sitting at another table representing her? A. Not that I recall.

Q. Now, I ask you if you recall being asked this question on May 15, 1961 on page 27, Your Honor.

"Q. But Miss Osborne did not go to court with you on that day?

[42] "A. No.

"Q. Did you tell her where you were going? Did you discuss with her the fact that the case was coming up for trial?

"A. Yes."

Now, does that refresh your recollection as to whether you had any discussions with Miss Osborne that you were going to come down and get a judgment against her? A. Well, I am not saying that I did -- I didn't make the deposition because as I said, from 1961, and I believe this is 1965, I can't recall quite as easily as maybe then. I still don't remember discussing with her.

Q. Now, when you got your judgment, did you go back and tell Miss Osborne how much it was? A. I don't know she knew. I don't remember telling her.

Q. You didn't tell her? A. I don't remember telling her.

Q. Did you have any kind of a family joke that she owed you $100,000? A. I don't recall. I don't recall if we made a joke of it or if I told her or whether I didn't tell her.

Q. Do you have an agreement with her or did you have an agreement with her that if you let me get the judgment, you [43] wouldn't try to collect it from her but you would only try to collect it from the insurance company? A. I didn't make any agreements with her about anything.

Q. Did you ever attach her salary? A. No, I didn't attach her salary.

Q. Did you ever report this judgment to the Department of Motor Vehicles so that she would lose her drivers license? A. I didn't know you were supposed to do that.

Q. Did you make any attempts to collect the judgment from her? A. No, I didn't.

Q. Now, how long did you all live together? A. I would say approximately one year. Maybe a little over.

Q. And then did you move in with someone else? A. Yes.

* * *

[44] Q. Did you continue to see Miss Osborne after you moved in with Marlene? A. Yes, I made a statement earlier that we have remained friends over a period of time that I have known her.

* * *

GILBERT ROSENTHAL

* * *

DIRECT EXAMINATION

BY MR. KILEY:

* * *

Q. Now, will you give the court and the jury your name and [45] address? A. My name is Gilbert Rosenthal. My home address is 2605 Cylburne Avenue, Baltimore, Maryland, 21215.

Q. What is your occupation, sir? A. I am an attorney.

Q. Are you in practice? A. Yes, I am in practice in the City of Baltimore, and Baltimore County primarily.

Q. And do you maintain your office for the practice of law in the City of Baltimore? A. I do. My offices are suite 919 Blaustin Building which is located at 1 North Charles Street, Baltimore, Maryland, 21201.

Q. Now, did there come a time when you met Edith Waters? A. Yes, there did.

Q. And under what circumstances did you meet her? A. I had come over to Washington to meet a Doris Osborne whom I had known. It was on a Sunday and while with Miss Osborne, she stated that she was going to see her girl friend who was in the hospital, and she asked if I would mind taking her up there and I said not at all, and we went up to the hospital and it was at this time that I met Miss Waters.

* * *

[46] Q. Now, when you first went to Walter Reed, did Miss Osborne retain you as her counsel? A. No, sir. She at that time had Baltimore counsel whose name I honestly do not remember. As a matter of fact, if I recollect correctly, she asked me to try and check into the matter as to what was going on because she had not heard from him for some time.

I told her that it would not quite be ethical for me [47] to do this at that point.

Q. Now, did there come a time when Miss Waters retained you as her counsel? A. Yes, sir.

Q. And thereafter did you meet with Miss Waters and discuss the case with her? A. Many times.

Q. And where did these conferences take place? A. At the hospital.

Q. When you refer to hospital, you mean Walter Reed? A. Yes.

Q. Now, upon the occasion of these subsequent conferences, that is, those conferences subsequent to the first one, can you recall whether

Miss Osborne was with you at any or some of those conferences? A. I really do not recall. I don't believe so but I cannot say -- it has been quite some time ago, and I cannot give you a definite no. I don't think so but I will say this: I am almost reasonably certain that any time this case was discussed, Miss Osborne was not present.

* * *

[48] Q. At a time subsequent then, did you undertake to represent Miss Waters? A. Yes, sir. I told Miss Waters that I could not represent her since there was another attorney in the case. She subsequently wrote to the attorney, received a -- no reply after a substantial period of time, and at that point, I was retained by Miss Waters, yes, sir.

* * *

[49] Q. And you have already testified after subsequent conferences, you can't recall whether Miss Osborne was present or not? A. I am reasonably sure she was not but I cannot say again 100 per cent.

* * *

[50] CROSS EXAMINATION

BY MR. GRAHAM:

Q. Mr. Rosenthal, where is your file? A. Where is my file?

Q. Yes, sir. A. It is mixed in with Mr. Kiley's.

Q. Did you refer the case to Mr. Kiley? A. To his office, yes, sir.

Q. And when was your retainer agreement with the Plaintiff, Miss Waters, signed? A. I do not recall whether there was any agreement signed.

Q. What agreement did you have with her as to fee? A. The standard attorney's fee.

[51] Q. How much were you to receive? A. One-third.

Q. And then when you referred the case to Mr. Kiley, did you refer it under a forwarding fee arrangement? A. Yes, sir.

Q. And how much of the forwarding fee were you to get? A. Was I to get?

Q. Yes, sir. A. I am pretty sure it was a 50-50 arrangement. I would not say for sure but that is the usual arrangement and I would assume that on this case, it would be the same.

Q. So that you have a financial interest in the outcome of this case which amounts to one-third of anything -- one half of one-third of anything that is recovered, is that correct? A. That is correct.

Q. Now, is it not usual and custom in the practice of law when you retain in a personal injury case, to write a letter to the proposed defendant putting that proposed defendant on notice that you are making a claim against them? A. That is correct.

Q. And did you write such a letter to Miss Osborne? A. I wouldn't know.

[52] Q. You wouldn't know? A. I don't recall. I am reasonably sure that I did write a letter either to her or to the company whoever it may have been.

Q. But I have a copy of a letter that you wrote to the insurance company but --

My question is, did you write one to Miss Osborne? A. I say again that I am not really sure.

Q. When did you first meet Miss Osborne? A. I met her in 1957.

Q. Where? A. Atlanta, Georgia.

Q. What were you doing there? A. I was in the Army. I was the Post Legal Assistant Officer, and at the Third Army Headquarters, Fort McPherson, Atlanta, Georgia.

Q. Did she have occasion to consult with you about this accident down in Atlanta? A. No, sir.

Q. After it happened? A. No, sir.

* * *

[53] Q. Did you have anything to do with Miss Waters discharge from the WACS? A. Miss Waters?

Q. Yes, sir. No, Miss Osborne, I am sorry. A. Yes, I did.

Q. What was your participation in her discharge from the WACS?

A. I at one time had represented her in the -- in my capacity in the Army.

Q. You represented her before the Board of Inquiry of some type? A. Yes, sir.

Q. And was that the Board of Inquiry that resulted in her discharge? A. Yes, sir, I believe it did.

Q. And did she at that time discuss the accident with you? A. Absolutely not.

[54] Q. Did she tell you that she had been in an accident at that time? A. No, sir.

Q. Wasn't the Board of Inquiry concerned about who she was with at the time the accident happened? A. No, sir.

Q. Did she tell you about her relationship with Miss Waters at that time? A. Until I met Miss Waters at Walter Reed Hospital, I knew nothing of Miss Waters whatsoever.

Q. When did you first learn that Miss Osborne had been in an accident? A. At Walter Reed Hospital.

Q. That day? Was that the day she took you there to meet Miss Osborne? A. I believe it was that day, yes, sir.

Q. That is the first time that Miss Osborne had told you she had been in an accident? A. Exactly.

Q. Even though you were representing her before a Board of Inquiry? A. I would like to explain to you, sir, that this Board of Inquiry had nothing to do with this accident.

[55] Q. I understand that. But didn't she explain the accident to you? A. Absolutely not. There was no need to.

Q. Now, did Miss Waters ever give you -- Miss Osborne ever tell you how the accident happened? A. I was told how the accident happened. I am not 100 per cent sure whether Miss Osborne or Miss Waters told me.

* * *

MR. GRAHAM: Again, I am going to have to have a paper out of the company file marked Garnishee exhibit No. 3 for identification.

(Garnishee exhibit No. 3 was marked for identification.)

BY MR. GRAHAM:

Q. Mr. Rosenthal, I hand you a letter dated April 21, [56] 1958, marked Garnishee's exhibit No. 3 for identification, and I ask you if you can identify that letter? A. It is my signature. I would assume it is my letter, yes, sir.

Q. Do you have a recollection of having written to the American Automobile Insurance Company putting them on notice that you were representing Miss Waters in a claim against Miss Osborne? A. Yes, sir.

Q. But you have no recollection of notifying Miss Osborne that you were going to present a claim, is that correct? A. I am not sure. This thing is April 21, 1958, six years ago.

Q. Well, you have looked at your file recently, haven't you? A. Sir, I do not have a file as such. Mr. Kiley has it.

The case was turned over to Mr. Kiley's law office. I gave him my file and which is the customary thing to do.

Q. And you haven't looked at it since then? A. That is correct.

Q. Well, now, I assume, sir, that you received the -- a [57] portion of the file of the other lawyer, the first lawyer, that was in the case? A. I received absolutely nothing from anyone else, sir.

Q. Sir, according to this letter here, you notified the company that Miss Osborne was insured under Policy No. A-1686119, is that correct? A. That is correct.

Q. Now, who told you Miss Osborne's policy number? A. I can't say.

Q. Isn't it a fact that Miss Osborne gave you her insurance policy? A. Did she give me her policy?

Q. Yes, sir, her policy. A. I honestly do not recall. She may have.

MR. GRAHAM: At this time, I call for the production of the defendant's pre-trial exhibit -- Plaintiff's pre-trial exhibit No. 1 which was the insurance policy presented at the pre-trial.

THE COURT: All right, sir. Do you want to mark it so we will know what we are talking about.

MR. GRAHAM: All right.

(Plaintiff's exhibit No. 1 was marked for identification.)

* * *

[58] BY MR. GRAHAM:

Q. Mr. Rosenthal, I show you Plaintiff's exhibit No. 1 for identification and it is American Automobile Insurance Company Policy No. A-1686119 which Mr. Kiley has just handed to me and ask you sir, if you can identify that policy as ever having seen it before? A. Yes, sir, I have seen it before.

Q. When did you see it? A. This may sound -- it may call -- I don't remember to be quite frank with you.

Q. Well, isn't it a fact that the policy -- isn't that the policy that Miss Osborne, my insured, gave to you and didn't you in turn give it to Mr. Kiley? A. Wait a second. I don't believe that I said that Miss Osborne gave me that. As a matter of fact, I do not know that she did.

Q. Do you have any recollection that she did? A. I say and I repeat again, I do not remember. I think I said before that she may have. I really do not know.

[59] Q. Do you know how this policy came into the possession of Mr. Kiley? A. If Miss Osborne gave it to me, it would then logically be that I gave it to Mr. Kiley. If she did not give it to me, I couldn't tell you how it got to Mr. Kiley.

Q. Now, how do you know that Miss Waters discharged her first attorney? A. Because I told her that I could not possibly represent her until he was discharged and she said she had given this matter to an attorney in Baltimore and had not heard anything.

I advised her that if she wanted to change attorneys, she would have

to put him on notice. She said that she would write to him and subsequently she told me that she wrote to him and she had received no answer whatsoever.

Q. And did you check with him -- did you see the letter she wrote to him? A. I don't think so.

Q. Did you check with him to see if in fact he had been discharged? A. I am not sure. I know that I don't know who it was now but I am not sure I knew it at the time.

Q. Did you check with him to see if he had any papers that [60] belonged to Miss Waters? A. I checked with him not one bit.

Q. Did you ever check to see if he was entitled to any fee for whatever services he had done up to the time that you came into the case? A. As I said, I don't even think that I knew who the attorney was.

I did not check with him at all.

* * *

[64] (At the bench:)

MR. KILEY: If Your Honor please, up to close of the trial on Wednesday I was of the opinion that Miss Osborne could do us more harm than good if she took the stand, and I did not put her on as a witness for the plaintiff. I have had opportunity to talk more in detail with Miss Osborne and I would now like to have her as a witness for the plaintiff.

THE COURT: Is she here?

MR. KILEY: Yes, sir, she is here.

THE COURT: You have a right to call her.

MR. GRAHAM: I am going to object. Her name has not been included among the list of witnesses. She's not a witness that the plaintiff hasn't known about since the inception of the accident of eight years ago.

MR. KILEY: I have never had an opportunity to talk with her, however, Your Honor. It was only after the close of [65] the trial on Wednesday that I had an opportunity to sit down and discuss the matter in detail with her. I think she can help now.

* * *

[68] DORIS V. OSBORNE

* * *

[71] DIRECT EXAMINATION

BY MR. KILEY:

Q. Now, Miss Osborne, when you reply to my questions, be sure you keep your voice sufficiently loud so His Honor can hear you without any trouble, and so the jury and Mr. Graham can hear you without any trouble.

Will you give the Court and jury your name and address, please?

A. Doris V. Osborne.

Q. Louder. A. Doris V. Osborne, 2000 North Adams Street, Arlington, Virginia.

MR. GRAHAM: I am sorry, I didn't get that address.

THE COURT: Two thousand what, Madam?

THE WITNESS: North Adams Street.

* * *

[72] BY MR. KILEY:

Q. And while you were in the WACs, where were you stationed?

A. Fort McClellan, Alabama and Fort McPherson, Georgia.

Q. Now in the course of that service did you meet Edythe Waters?

A. Yes, sir.

Q. Where did you meet her? A. Fort McPherson, Georgia.

Q. And how long have you known Miss Waters? A. About eight years.

Q. Would you say it was a close friendship? A. I would say it was a close friendship.

Q. Now while you were in the Women's Army Corps, did you purchase an automobile? A. Yes, sir.

Q. And where did you purchase it? A. Nalley Chevrolet.

Q. And where is that? A. In Atlanta, Ga.

Q. You will have to keep your voice up, Miss Osborne. A. In Atlanta, Ga.

[73] Q. Now, what were the circumstances of that purchase.

MR. GRAHAM: I would object to the circumstances, Your Honor. I don't mind her saying what happened, but not the circumstances.

BY MR. KILEY:

Q. Who selected the car? A. I selected the car.

Q. Who paid for it? A. I paid for it.

Q. Who had the insurance on it? A. I had the insurance.

Q. Who paid for the insurance? A. I did.

Q. Who paid the expenses and upkeep of the car? A. I did.

Q. Who had the keys for it? A. I had the keys.

Q. Did Miss Waters have a key to the car? A. No, she didn't.

Q. Did Miss Waters have any degree of ownership in that car?

MR. GRAHAM: I object to that. That calls for a fact to be determined.

THE COURT: Sustained.

* * *

[75] BY MR. KILEY:

Q. Now, as a result of the accident did you give your -- oh, how many kinds of insurance did you have on your car? A. Well, I had the insurance while we were paying for the car, and I had the liability along with that with the American Automobile.

Q. Is it correct to say that you had the collision insurance in one company and the liability insurance with another company? A. True.

Q. And your liability insurance was the American Automobile Insurance Company? A. Yes, sir.

Q. You have already testified that they had issued you a policy of insurance? A. Yes, sir.

Q. Now I show you this, what is marked as Plaintiff's Exhibit 1, for identification, and ask if you can identify it? [76] A. Yes, sir, that's my policy.

Q. That's the insurance policy that was issued by the American Automobile Insurance Company? A. That's right.

Q. And what kind of car was this issued to? A. My 1952 Chevy, the first one.

Q. And then was this insurance transferred to the car you bought? A. Yes, sir.

Q. What kind of car was that? A. '57 Chevrolet, four-door.

Q. And that was the car that was involved in the accident? A. Yes, sir.

Q. Now, as the result of the accident, what was the condition of the '57 Chevrolet? A. It was completely demolished.

Q. Did you report that to your insurance companies? A. When I was in the hospital in Florence --

THE COURT: No, Madam, he did not ask you where you were. He said did you report it.

BY MR. KILEY:

Q. Did you report it to your insurance company?

MR. GRAHAM: May we know which insurance company you are referring to.

[77] THE COURT: Yes.

BY MR. KILEY:

Q. Did you report it to your insurance companies? A. Yes, I did.

Q. Now which insurance companies did you report it to? A. I reported it to both.

Q. Now did you personally report it, or did someone for you report it? A. No, I did not.

Q. Did someone else report it? A. Yes.

MR. GRAHAM: I am going to object to this and ask that it be stricken and the jury be instructed to disregard her statements that she reported it to the insurance company.

THE COURT: Actually that is not the fact, as I understand her testimony, and that will be stricken.

I understand you to say that you -- put it this way -- are you saying you asked someone to report it to your insurance company?

THE WITNESS: True. I didn't ask someone. The Legal Advisor came to see me.

THE COURT: No.

MR. KILEY: Wait a minute, wait a minute.

THE COURT: If you will, please. First, you personally [78] did not advise either of the companies?

THE WITNESS: No.

THE COURT: You did ask someone to advise one or both?

THE WITNESS: True.

THE COURT: Which, one or both?

THE WITNESS: Both.

BY MR. KILEY:

Q. Now, as the result -- no.

Did you eventually have your car replaced? A. Yes, sir.

Q. And who replaced it? A. Nalley Chevrolet -- my insurance company from where I bought the car.

Q. Now, would that have been the American Automobile Insurance Company or the other carrier? A. The other carrier.

Q. That would have been your collison carrier? A. True.

Q. Now, when that car was replaced did you receive any money from your collision carrier? A. As far as I can remember I didn't.

Q. Do you have any recollection in connection with this collision that you received a check from your collision carrier to the joint order of you and Miss Waters? [79] A. As far as I can remember I didn't.

Q. You have already testified that on your best recollection you received no money at all? A. True.

Q. When was the replacement car delivered to you? A. It was after I got out of the hospital, about September.

THE COURT: September when, ma'am?

THE WITNESS: About November of '57.

THE COURT: November of '57?

THE WITNESS: Yes, sir.

BY MR. KILEY:

Q. Now did you attempt to get insurance on the replacement car? A. Yes, I did.

Q. From whom? A. I wrote my broker, Mr. Rebholtz, in St. Louis, Mo.

Q. Now, Mr. Rebholtz, is that the same Mr. Rebholtz, Frank J. Rebholtz & Son? A. Yes, sir.

Q. And as a result of that communication to Mr. Rebholtz, did you get coverage on your replacement car? A. Yes, sir.

Q. And did you, as a result of that, receive from the insurance company an indorsement of any kind for the policy you had? [80] A. Yes, I did.

Q. I show you what appears to be a form from the insurance company. Can you identify this? A. Yes.

Q. Now, keep your voice up so Mr. -- A. Yes.

Q. Now, what does this purport to accomplish? A. This and this?

Q. Yes. A. Well, this is for the car that was completely demolished, and this is for my replacement car.

Q. One is referred to as the '57, four-door Chevrolet, and the other as a '57, two-door Chevrolet? A. Correct.

Q. Now, will you read to the Court and jury the effective date of this policy? A. 11/26/57.

Q. That is the same month you wrote to Mr. Rebholtz? A. Yes, sir.

Q. Now, thereafter did you receive any further communication from the American Automobile Insurance Company, or from Mr. Rebholtz, their agent? A. When I tried to renew my policy, I did.

Q. Now, when did you try to renew your policy? [81] A. I believe it was in June.

Q. June of what year, can you recall? A. '58.

Q. June of '58? A. Yes, sir.

Q. And what was the result of that attempt? A. Well, I'd sent

them a Money Order and they sent my Money Order back saying my insurance had been canceled.

Q. Now, had you had any accidents or had you filed any claims against the American Automobile Insurance Company as a result of the use of your two-door, '57 Chevrolet? A. No, I hadn't.

Q. So you were notified -- now, can you recall when you wrote to Mr. Rebholtz to have the insurance continued? A. Do you mean for the car that they gave me?

Q. Yes. A. Well, I wrote to them either before I got out of the hospital or right after I got out of the hospital.

Q. Can you tie that to a month and a year? A. Well, it was possibly -- it must have been November, sometime in November.

* * *

[82] Q. Now, when you bought the first 1957 car, did you sign certain papers? A. Yes, I did.

Q. And at the time you were signing those papers was Miss Waters with you? A. Yes, she was.

* * *

[83] Q. Do you know whether or not she signed any papers? A. Yes, I do.

Q. And did Miss Waters have any say in the selection of the car? A. No, she didn't.

Q. Did you pay cash for the car? A. No.

Q. How did you pay for it? A. By the month.

Q. Did you have the usual thing -- did you have a turn-in on it? A. Yes, I did. I turned in my '52 Chevrolet.

Q. Now, who owned that '52 Chevrolet? A. I did.

Q. Anybody else? A. No, sir.

Q. Now, when you settled with your collision carrier and got the '57, two-door replacement car, do you know whether or not Miss Waters received any benefit from your collision carrier? A. No, I don't.

Q. You don't know or she did not? A. I don't think she did.

Q. Now when you were driving your car in September of [84] 1957, was this policy paid for? Were the payments current on this policy? A. Yes, they were.

Q. And at the time of the accident then, this was a policy in full force and effect? A. True.

THE COURT: Did she mean by that that she had paid the premium, current premium? That is what you are saying, sir?

MR. KILEY: Yes, sir.

THE COURT: All right.

BY MR. KILEY:

Q. Now of your knowledge, do you know whether or not at any time, from the time you purchased the '57 Chevrolet, four-door, to the time of the accident, whether Miss Waters had any interest in that automobile at all? A. As far as I'm concerned she didn't. She was just -- as far as I'm concerned she didn't. She was just a co-signer for me.

Q. Did you say did or did not? A. Didn't, did not.

Q. Did not? She was a co-signer for what? A. In order for me to purchase the car.

Q. Do you know why it was necessary for her to sign anything for you --

[85] MR. GRAHAM: I object to that, if Your Honor please.

THE COURT: I will sustain the objection.

BY MR. KILEY:

Q. Did Miss Waters have any interest, so far as you know, in the 1957, two-door, replacement Chevrolet? A. No.

Q. Are you acquainted with Gilbert Rosenthal? A. Yes, I am.

Q. Of your own knowledge, do you know whether or not Mr. Rosenthal and Miss Waters are acquainted? A. Yes, they are acquainted.

Q. Now do you know how they met? A. Yes.

Q. How? A. Mr. Rosenthal was visiting me one Sunday in Washington --

Q. Let me interrupt, if you please.

Can you tie that up to a date, a month of the year? A. Well, I think it was in January of '58.

Q. Go ahead. A. And he came to visit me and I so happend to be going to the hospital, so I asked him to drive me along, so he did, and I introduced Mr. Rosenthal to Miss Waters as my attorney, and that's how they met.

* * *

[86] Q. Are you aware that subsequent to that meeting -- if [87] you know now, if you don't just say so -- whether or not Mr. Rosenthal thereafter was retained to represent Miss Waters? A. Yes, I know that he was retained, but I didn't ever discuss anything with them.

* * *

Q. Now do you remember being served with suit papers in a suit filed against you by Miss Waters? A. Yes, sir.

Q. Do you remember when that was? A. No, I don't remember.

[88] Q. Do you remember what you did with the suit papers? A. Yes, I sent them back to my insurance company.

Q. Now when you say your insurance company, you --

MR. GRAHAM: I object to that. She said she sent them to her agent.

THE COURT: Whom did you send them to, ma'am?

THE WITNESS: I think I sent them back to the automobile insurance company.

THE COURT: Well, do you know?

THE WITNESS: No, I don't know for sure.

THE COURT: All right.

BY MR. KILEY:

Q. Did you get any response from whomever you sent the suit papers? A. Yes, I did.

Q. Were the suit papers returned to you? A. Yes.

Q. And what did you do with them then? A. I took them to a lawyer that was recommended to me by someone.

Q. Did you confer with that lawyer? A. Yes, one time.

Q. And what was the result of the conference, if you know? [89] A. I don't remember.

Q. Did he undertake to represent you? A. No, because I couldn't afford him.

Q. At any time during the pendency of this matter, have you discussed the accident or the insurance or anything of that nature with Miss Waters? A. Well, we've talked about it, but we really haven't discussed it.

* * *

Q. Of your own knowledge, do you know when Miss Waters was discharged from the hospital? [90] A. No, I can't remember when she was discharged.

Q. Do you remember where she went after she was discharged, went to live after she was discharged? A. She went to live with me.

Q. She in effect moved in with you, is that it? A. That's right.

* * *

[91] Q. Did you ever receive a request from your insurance company, the American Automobile Insurance Company, following the accident, to do anything at all? A. The only thing that I received were those suit papers.

Q. No, you received those suit papers on behalf of Miss Waters? A. Oh, I see.

Q. I mean did you ever receive a request from your insurance company to do anything at all? A. Not as far as I can remember.

Q. Were you ever approached by an agent of your insurance company? A. Yes, after I came to Washington.

[92] Q. And when was that, do you remember? A. I don't remember what time of the year it was.

Q. Do you remember the year? A. Well, it must have been in '58, sometime in '58.

Q. Was it before or after this suit was filed? A. It must have been before.

Q. Before the suit was filed? A. To my knowledge.

Q. On the best of your recollection? A. That's right.

Q. Now, do you remember the purpose of the visit of the agent of the insurance company? A. Yes. He came to get a deposition from me about the accident.

Q. You gave him the deposition or statement? A. Yes, I did.

Q. And was that before or after they notified you that your insurance had been canceled? A. That was before, I think.

Q. Now, other than the visit from the agent of your insurance company, did you receive any further requests from your insurance company to do anything at all? A. No, I didn't.

Q. So is it safe -- is it true and accurate then to say [93] that the only communication you have had with your insurance carrier is this visit from the agent? A. True.

Q. Based on your best recollection, did you ever refuse to cooperate with your insurance company in connection with this accident in any regard? A. No, I don't suppose so.

* * *

MR. KILEY: If Your Honor please, at this time I would like to introduce the insurance policy as Plaintiff's Exhibit 1.

MR. GRAHAM: No objection.

THE COURT: It is received.

[94] THE DEPUTY CLERK: Plaintiff's Exhibit No. 1 marked into evidence.

(Insurance Policy, Plaintiff's Exhibit No. 1 was received in evidence.)

CROSS EXAMINATION

BY MR. GRAHAM:

* * *

[95] Q. And during the past year, from March of 1964 up until the present time, have you had occasion to see Miss Waters? A. Yes, I have.

Q. How often? A. Well, we visit regularly.

Q. How often? A. Well, I don't know how often, just weekends.

* * *

[96] Q. What was Mr. Rosenthal representing you for? A. Service, when I was in the service.

Q. In connection with your discharge from the service? A. That's true.

Q. What kind of a discharge do you have? A. General.

Q. And when did you get that? A. In '57, December of '57.

Q. And after your discharge did you come to Washington immediately? A. Yes, I did. It was about a week.

Q. And why did you come up here to live? A. Well, I had no reason to go anywhere else.

Q. Well, you were originally from St. Louis, were you not? A. True.

Q. Did you come up here so you could be here with Miss Waters? A. No, I didn't come up here just because I wanted to be with Miss Waters.

Q. Did you consider yourself to be married to Miss Waters? A. No, I didn't.

Q. Did you at any time make a representation that she was your wife? [97] A. No.

Q. Did you tell a representative of the insurance company, namely, Mr. Page Digman, on May 5, 1955 -- sorry, the year 1958, that Miss Waters was your wife? A. Not as I can remember.

THE COURT: Not what, madam?

THE WITNESS: Not as far as I can remember.

THE COURT: Keep your voice up, please.

BY MR. GRAHAM:

Q. You don't deny making that statement to him, do you? A. I don't think I made it.

Q. Do you deny under oath that you made it? A. Well, as far as I can remember I didn't make it.

Q. Did you ever give Mr. Rosenthal a history of how this accident happened? A. No.

Q. Well now, when he was representing you in a Board of Inquiry in Atlanta, Georgia, his representation was not concerned with the accident, was it? A. No, it wasn't.

Q. But in connection with this Board of Inquiry you did discuss the fact with Mr. Rosenthal that you had been in the hospital for three months, did you not? A. Yes.

[98] Q. And did he ask you why you were in the hospital? A. Well, I told him that I had an accident.

Q. Did you tell him how the accident happened? A. I don't recall if I told him how it happened or not.

Q. Did you ever give him a statement concerning how the accident happened? A. I don't know.

Q. Did you ever give him a written statement telling him about the accident? A. As far as I can remember, I don't know.

Q. Do you know how Mr. Rosenthal found out the limits of your insurance policy, how much insurance you had? A. No, I don't.

Q. Do you know how Mr. Rosenthal found out your policy number? A. No, I don't.

Q. Now Mr. Rebholtz was your broker, you said; is that correct? A. True.

Q. And do you know how Mr. Rosenthal secured Mr. Rebholtz name in order to write him a letter? A. No.

Q. Did you give him Mr. Rebholtz' name? A. No, I didn't.

[99] Q. Did Miss Waters know Mr. Rebholtz' name, to your knowledge? A. Not to my knowledge.

Q. You say you introduced Mr. Rosenthal to Miss Waters as your attorney; is that correct? A. True.

Q. Now when Mr. Rosenthal decided to sue you, didn't you have a discussion with Mr. Rosenthal and say, "You can't sue me, you're my lawyer"? A. No, I didn't.

Q. Did he tell you that ethics prohibited him from suing you because he also represented you? A. No.

* * *

Q. Would you like to have the question re-read to you? A. Yes, I would.

MR. GRAHAM: Would you mind reading it, please.

(The reporter then read the question as follows:

'Did he tell you that ethics prohibited him from suing [100] you because he also represented you?")

THE WITNESS: No, because he wasn't representing me for the same type of thing.

BY MR. GRAHAM:

Q. Well, what type of thing was he representing you for? A. I wanted to get back in service. That's why he was representing me.

Q. Were you able to get back in service? A. No, I wasn't.

Q. When did he stop representing you? A. When I found out I couldn't get back in the service.

Q. When was that? A. I don't know what year it was.

Q. So there is no doubt that you and Miss Waters owned this car together, was there? A. As far as I'm concerned I owned it and she co-signed.

MR. GRAHAM: May I have the deposition of Mr. Crowell.

(The document was handed to Mr. Graham.)

BY MR. GRAHAM:

Q. Miss Waters had the right to use this car as her own, did she not? A. Well, she used it very seldom.

Q. Did she have to ask your permission to use it? A. Yes.

[101] Q. The car was delivered to you and sold to Doris V. Osborne and Edythe Waters, was it not? A. That's correct.

Q. I will show you a piece of paper previously marked Garnishee's Exhibit 2 by the Pretrial Examiner, and ask you can -- and it is entitled -- it's on a blank of Nalley Chevrolet -- and ask you if you can identify the two names that are signed here as buyer's signature? A. That is my signature.

Q. Do you recognize Miss Waters' signature? A. It looks like it.

Q. All right, now then I will also show you a piece of paper -- well it is on the reverse of this Exhibit 2 -- and ask you if you can identify the signature that appears at the bottom of that page? Ma'am? A. Yes, that's my signature.

Q. All right now, that is a questionnaire that you filled out concerning such things as where you work, your bank references, et cetera; is that correct? A. True.

Q. Now, is there a question there that you were asked: "Names of all single persons under 25 years of age other than me who will operate the car."? Were you asked that question? A. Do you want me to read that?

[102] Q. Yes. What answer did you give? A. She wrote "Edythe Waters."

Q. She or you wrote? Who signed that page? A. It looks like my handwriting.

Q. So you were asked the names of people under 25, single people under 25, who would operate the car. You wrote, "Edythe Waters, friend"; is that correct? A. True.

Q. Now, Edythe Waters signed a similar page to that, did she not, in which when she was asked the question, she listed "Doris Osborne, friend." -- isn't that correct? A. That's correct.

Q. And then there came a time, did there not -- there came a time, you said, when you notified your insurance company that you were purchasing the new car and that you wanted your insurance changed to the new car; is that correct? A. That's correct.

Q. And did you write to your broker, Mr. Rebholtz, about that?
A. As far as I can remember.

Q. And you told Mr. Rebholtz that you wanted to cancel your insurance on your 1952 Chevrolet and reissue it on a 1957; is that correct? Ma'am? A. Yes, sir.

[103] Q. And did you tell Mr. Rebholtz that Miss Waters was a joint owner of that car? A. No, I didn't.

Q. And then there came a time when someone from the insurance company got in touch with you after you were up here in Washington; is that correct? A. That's correct.

* * *

MR. GRAHAM: May this be marked Garnishee's Exhibit No. 4.

THE DEPUTY CLERK: Garnishee's Exhibit No. 4 marked for identification.

(Statement signed by Miss Osborne, dated May 5, 1958, was marked Garnishee's Exhibit No. 4, for identification.)

[104] BY MR. GRAHAM:

Q. Isn't it a fact that on May 5, 1958, you had a talk with the representative of the insurance company, one Mr. Page Digman, and that you told him that you hadn't reported the accident, that you didn't think it was necessary because the two of you owned the car jointly, and furthermore you figured the military would have reported it? A. The military was supposed to report it.

Q. No, just answer my question. A. I don't remember stating that.

Q. I will show you a piece of paper marked Garnishee's Exhibit 4, for identification, and ask you to read it and to read the signature on there and tell the Court and the ladies and gentlemen of the jury whether or not that is your signature?

(The witness examined the exhibit.)

A. That's my signature.

Q. Now does that refresh your recollection of your conversation with the representative of the insurance company? A. It refreshes my memory.

Q. All right. Now is it your recollection now that you told the man you had not reported the accident because; number one, you and Miss Waters owned the car jointly, and number two, the military was going to report it, you thought? A. Well, yes.

[105] Q. And now then that is dated May 5 -- is that correct -- 19 -- A. 1958.

Q. And then four days later, on May 9, 1958, were you mailed a letter from your insurance company telling you that the company was disclaiming any liability; number one, because you owned the car jointly with someone else and had not informed the company; and number two, you had not notified the accident to them within a reasonable time as required by the policy? A. I don't remember getting a letter like that.

MR. GRAHAM: Would you mark this Garnishee's Exhibit 6, or is it 5?

THE DEPUTY CLERK: Garnishee's Exhibit No. 5, marked for identification.

(Letter dated May 9, 1958, with attached receipt for registered mail, was marked Garnishee's Exhibit No. 5, for identification.)

BY MR. GRAHAM:

Q. Miss Waters, I show you Garnishee's Exhibit 5, for identification, consisting of one page, plus a registered receipt, a receipt for registered mail, plus a receipt signed for registered mail, and ask you if you can tell us the name -- if you can identify the signature of the person who signed for that registered letter?

You can read the letter in just a moment, but first [106] can you tell us whose signature is on there? A. Yes, that's my signature.

THE COURT: I did not hear you.

THE WITNESS: Yes, it is.

THE COURT: Whose signature?

THE WITNESS: It's my signature.

* * *

BY MR. GRAHAM:

Q. Now then, does that letter refresh your recollection that the company, four days after you gave this statement about not reporting the accident, wrote you and said that they were disclaiming the liability because you owned the car jointly and had not notified them of that fact, and that you had not reported the accident as required by the policy? A. Well, to my knowledge the accident was reported.

Q. Well, does this report, does this refresh your recollection? A. I don't even remember ever reading this.

Q. Do you deny receiving that letter? A. I don't deny it, but I don't remember reading it.

Q. Do you commonly get letters you don't read, registered letters that you don't read? A. True, I do.

* * *

[108] Q. Miss Osborne, according to the return of service made by the Deputy United States Marshal, he served you on 1400 Downing Street, Northeast, at 10:53 a.m., December 12, 1958 -- Mr. Kiley, please don't go through my file -- at 10:53 a.m. on December 12, 1958.

Now, does that refresh your recollection as to where you were living and with whom you were living when the Marshal served you with the suit papers? A. I guess I was living at 1400 Downing Street. It says so.

Q. December 12, 1958 -- and were you living with Judy Waters at that time? A. I don't remember if she was out of the hospital or not. [109] I guess she was.

Q. Now when you got the suit papers, did you discuss them with Miss Waters? Did you say, "Look, you're suing me for a quarter of a million dollars. What's this all about?" A. I don't remember if I discussed them or not. I probably didn't even know what they were.

Q. You mean you got the suit papers and you didn't even look at them? A. Yes, I looked at them.

Q. You knew what they were, didn't you? A. Well, I knew what they was, but I thought I should send them to my insurance company and let them take care of it.

Q. So you didn't discuss it at all with Miss Waters? A. Not as far as I can remember.

Q. Didn't you say, 'Who is this Mr. Kiley? Why is he suing me? I thought Mr. Rosenthal was your lawyer." A. I don't remember that.

Q. Did you know who Mr. Kiley was? A. I hadn't met Mr. Kiley.

Q. Didn't you question your roommate, or your apartment-mate, about what happened to Mr. Rosenthal? A. No.

Q. Then you say you sent these insurance, or the suit papers on to Mr. Rebholtz, your broker; is that correct? [110] A. I sent them to the American Automobile Association. I don't know if I sent them to him or they.

Q. Now did there come a time when those suit papers were sent back to you? A. True.

Q. And I show you two pieces of paper previously identified as Garnishee's Exhibit 2, letter dated December 31, 1958, addressed to you at your former address on 16th Street, with a copy to your address on Downing Street, and ask you if you received that letter? A. Yes, I received it.

Q. That's a letter sending the suit papers back, telling you the company was not going to represent you because you hadn't reported the accident, and because of the joint ownership of the car, that the company had not been notified of; is that correct? A. That's what it says.

Q. And incidentally, would you tell the Court and ladies and gentlemen of the jury who signed for that registered letter addressed to you? A. It looks like Miss Waters' signature.

Q. Signed "Judy Waters" -- is that correct? A. That's right.

Q. Now, when Miss Judy Waters, signed for this letter, did she give it to you? [111] A. Yes.

Q. And did you open it, or had she opened it? A. I don't know if she had opened it. I don't suppose, because she didn't open too much of my mail.

* * *

Q. Now then, what conversation did you and Miss Waters have then when you got the suit papers back? A. I don't know what kind of conversation we had.

Q. Don't you remember anything you discussed with her? A. No, I don't.

Q. Now what is the name of this lawyer that you say you went to see? A. I think his name was Dwight or Dwyer, or something like that.

Q. And you say he refused to even handle the case because you didn't have any money? A. I didn't say that. I said I couldn't afford a lawyer.

Q. Did Mr. Dwyer say he would not handle it because you couldn't pay him? [112] A. I don't think he said that. I just couldn't afford a lawyer.

Q. Did Mr. Dwyer tell you that there is an organization jointly sponsored by the United Giver's Fund and the Bar Association called the Legal Aid Agency that would be glad to represent you free gratis if you couldn't afford a lawyer? A. No, I don't remember him telling me nothing like that.

Q. Had you ever heard of the Legal Aid Agency? A. No.

Q. Now what did you do then when Mr. Dwyer didn't represent you? What did you do then? A. I didn't do anything.

Q. Didn't you discuss with Miss Waters the fact that you didn't have any insurance, you didn't have any money to hire a lawyer?

Incidentally, where were you working then? A. IBM.

Q. As a machine operator? A. Yes, sir.

Q. Did you discuss with Miss Waters the fact that you didn't have any insurance, you didn't have any money; she was living there with you and that she shouldn't sue you? A. No, I didn't.

Q. Did you ask her not to sue you? [113] A. No, I didn't.

Q. Did you talk to Mr. Kiley to see if maybe he would help refer you to someone who could represent you? A. I don't recall. I don't think so.

Q. Then there came a time, did there not, on the day that Miss Waters was going to come down here to court to get a judgment against you? Do you recall that? A. Yes.

Q. And what conversation did you have with her about that day? A. I don't remember.

Q. Did you ask her to please not get the judgment against you, that you would try to get some money together and pay her? A. No.

Q. Did you ask her to not sue you then? A. No.

Q. Did you come down to contest your case? A. No.

Q. When did you see her after she came to court? When did you next see her? Was it that evening? A. I don't remember. It could have been.

Q. Did she tell you how much money she had gotten, how much judgment she had gotten against you? A. She never did tell me how much money she was getting, [114] or anything like that.

Q. How big a judgment did she get against you? A. I don't even know that.

Q. She never communicated the fact that you owe her some money? A. I don't even know how much judgment it is, really.

Q. Mr. Kiley never told you how much it is? A. I don't think he has.

Q. Didn't anyone ever file an attachment or garnishment against your wages at IBM? A. No, they didn't.

Q. Has anyone ever asked you to pay this judgment? A. No, they haven't.

Q. Have you signed any papers, or signed any judgment or any of your rights over to Miss Waters? A. No.

Q. Have you been asked to? A. No, I haven't.

Q. Has anyone, since 1959 when this judgment was entered, asked you to pay a dime? A. No.

Q. Did you give her your insurance company and say go ahead and see if you can get it from the insurance company, if you can skizzle them, I'm all for it? [115] A. No, I didn't.

Q. When did you give her your insurance policy? A. I didn't give it to her.

Q. When did she steal it? A. I don't know when she took it.

Q. Isn't it a fact that you gave that policy to Mr. Rosenthal before May 23, 1958? A. I never did give Rosenthal my insurance policy.

Q. Did you give him the information from the policy, including the policy number? A. No, I didn't.

Q. You never told him how the accident happened? A. I might have, while I was talking, told him how it happened.

Q. As a matter of fact, you used that as part of your defense in the Board of Inquiry, the fact that you had been in an accident -- is that correct? A. No, sir, that was not brought up.

Q. Now what did you mean when you said that you and Judy Waters have talked about it but really haven't discussed it? A. Well, I don't know what actually I mean by that. I know we just talked about it here and there, but we've never really sat down and discussed it.

Q. Well, did you tell Mr. Rosenthal that you were tired [116] and sleepy when this accident happened, and you asked Miss Waters to stay awake, to keep you awake, that she went to sleep and then you went to sleep, and the car went off the road? A. No, sir.

Q. You told Mr. Rosenthal that? A. I might have.

Q. Well, did you or didn't you? A. I guess I did.

Q. And then on May 9, after May 9 when you received this registered letter, May 9, 1948, that was just about at the time you were getting ready to renew your insurance policy which expired on -- what was the date that policy expired, June -- A. June 3d, 1958.

Q. June 3d. Within less than a month your policy expired -- is that correct -- from May 9th? A. Yes.

Q. And the company then said, we are not going to renew it? A. That's true.

Q. So you had to get insurance elsewhere? A. Yes.

Q. When you said the agent from the company came to get a deposition, was that -- of course we lawyers have a different terminology of a deposition from a statement -- was that the [117] statement you were talking about that the agent from the company came to get from you, a written statement? A. It was a statement.

Q. It wasn't someone where you were put under oath and there was a court reporter taking your deposition? A. No.

Q. It was just a statement that he wrote out and you signed; is that correct? A. That's correct.

* * *

[119] RECROSS EXAMINATION

BY MR. GRAHAM:

Q. Were you insured with the American Automobile Insurance Company before you went into the WACs? A. Yes, I was.

Q. And they continued you on after you went into the WACs? A. Yes, sir.

* * *

[Vol. 3, p.2] THE COURT: Mr. Kiley, I have for determination the motion of the garnishee for a directed verdict, based on three grounds:

(1) That the insured declared that she was the sole owner of the automobile covered by the policy, whereas the evidence shows that the automobile was jointly owned. This was a false material representation. See Paragraph 29 of the CONDITIONS of the policy. An insurance company has the right to know with whom it is contracting, as this can well have a material effect on the risk assumed. Intent to deceive is not material. Insured admits joint ownership and attempted to justify failure to notify because of such fact.

(2) Lack of notice - as required by Paragraph 3 of the CONDITIONS of the policy. Plaintiff's evidence shows that the Insurance Company did not receive from the insured - Osborne - or her agent notice of the injuries alleged to have been sustained by the plaintiff until letter of April 21, 1958, nearly eight months after the accident, which occured September 7, 1957. Those of us who deal in the tort field, and peculiarly so in the matter of traffic cases and automobile accidents, know that you either get your witnesses promptly or you do not have witnesses. There is no showing of inability to have complied with Paragraph 3 [3] of the CONDITIONS of the policy -- that notice "shall be given by or for the insured to the company or any of its authorized agents as soon as practicable."

The insured attempts to show compliance with the conditions of the policy by testimony to the effect that her insurance broker in St. Louis changed the automobile described in the policy from one 1957 Chevrolet to another 1957 Chevrolet, indicating destruction of the original 1957 car. The insurer here (garnishee) was in no wise concerned with property damage, the policy in question being one covering liability and exacting notice of any personal injuries received as a result of any accident in which the automobile covered by the policy was involved. This was not notice, nor was it such as to require the insurer of its own volition to make an investigation for the purpose of ascertaining whether or not there were any personal injuries to anyone as to which the insured might be sued. This responsibility and duty was on the insured pursuant to the terms of the contract between her and the Company.

Paragraph 3 of the CONDITIONS of the policy required compliance as a condition precedent to any action against the Company.

(3) Lack of cooperation on the part of the insured.

Viewing the evidence presented by the plaintiff, as I am required by law to do, in the light most favorable to the plaintiff, and indulging in all reasonable inferences deducible [4] from the evidence, I am constrained to grant the garnishee's motion for a directed verdict, for the

reason that if the jury should return a verdict against the garnishee I would be required to set it aside. I do so on the first enumerated ground, namely, misrepresentation as to ownership declarations of the insured showing sole ownership in her, whereas in fact the evidence in the case shows that the vehicle covered was jointly owned by the insured and the plaintiff, and also on the second ground set forth by the garnishee, namely, that there was a failure by the insured or her agent to notify the Company as soon as practicable of the injuries sustained by the plaintiff.

While I deem there is much merit in the third ground presented for a directed verdict by garnishee's counsel, I have not utilized that as one of the bases for the directed verdict. I shall now call in the jury for the purpose of directing a verdict for the garnishee.

AMERICAN AUTOMOBILE INSURANCE COMPANY

JA 61

POLICY NUMBER A-168 6119

DORIS V. OSBORNE
CO. A TRAINING BATTALION
FORT MC CLELLAN
CALHOUN CO., ALABAMA

ITEM 3. POLICY PERIOD

FROM JUNE 2 1957 TO JUNE 2 1959

Comprehensive
AUTOMOBILE POLICY

PLEASE READ YOUR POLICY

AMERICAN AUTOMOBILE INSURANCE COMPANY
Saint Louis, Missouri

(A Stock Insurance Company, herein called the Company)

C.A-2114-58

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to all of the terms of this policy:

PART I — LIABILITY

Coverage A — Bodily Injury Liability:

Coverage B — Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of:

A. bodily injury, personal injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," sustained by any person;

B. injury to or destruction of property, including loss of use thereof, hereinafter called "property damage";

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile, and the Company shall defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the Company may make such investigation and settlement of any claim or suit as it deems expedient.

Supplementary Payments

To pay, in addition to the applicable limits of liability:

(a) all expenses incurred by the Company, all costs taxed against the insured in any such suit and all interest on the entire amount of any judgment therein which accrues after entry of the judgment and before the Company has paid or tendered or deposited in court that part of the judgment which does not exceed the limit of the Company's liability thereon;

(b) premiums on appeal bonds required in any such suit, premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, and the cost of bail bonds required of the insured because of accident or traffic law violation arising out of the use of an automobile insured hereunder, not to exceed $250 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of an accident involving an automobile insured hereunder and not due to war;

(d) all reasonable expenses, other than loss of earnings, incurred by the insured at the Company's request;

(e) for actual loss of earnings incurred by the insured while attending hearings or trials at the request of the Company in connection with any occurrence for which insurance is provided hereunder, subject to a maximum of $25 per day and a total of $500 for any such occurrence;

(f) in an amount not in excess of $50, for reasonable legal expenses, other than a fine or forfeiture of bail, incurred by the insured in the event of his arrest as a result of an accident for which insurance is provided under coverage A or B.

Persons Insured

The following are insureds under Part I:

(a) With respect to the owned automobile,

(1) the named insured and any resident of the same household,

(2) any other person using such automobile, provided the actual use thereof is with the permission of the named insured;

(b) With respect to a non-owned automobile,

(1) the named insured,

(2) any relative, but only with respect to an automobile not owned by such relative;

(c) Any other person or organization legally responsible for the use of

(1) an automobile or trailer not owned or hired by such person or organization, or

(2) a temporary substitute automobile,

provided the actual use thereof is by a person who is an insured under (a) or (b) above with respect to such automobile or trailer.

The insurance afforded under Part I applies separately to each insured against whom claim is made or suit is brought, but the inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability.

Definitions

Under Part I:

"named insured" means the individual named in item 1 of the declarations and also includes his spouse, if a resident of the same household;

"insured" means a person or organization described under "Persons Insured";

"relative" means a relative of the named insured who is a resident of the same household;

"owned automobile" means a private passenger or utility automobile or trailer owned by the named insured, and includes a temporary substitute automobile;

"temporary substitute automobile" means any automobile or trailer while temporarily used as a substitute for the owned automobile or

(Part I — Liability Continued on Page Two)

trailer when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction;

"non-owned automobile" means an automobile or trailer not owned by the named insured, other than a temporary substitute automobile;

"private passenger automobile" means a private passenger, station wagon or jeep type automobile;

"utility automobile" means an automobile with a load capacity of fifteen hundred pounds or less of the pick-up body, sedan delivery or panel truck type;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business purposes with other than a private passenger or utility automobile;

"automobile business" means the business of selling, repairing, servicing, storing or parking of automobiles;

"use" of an automobile includes the loading and unloading thereof;

"war" means war, whether or not declared, civil war, insurrection, rebellion or revolution, or any act or condition incident to any of the foregoing.

Exclusions

This policy does not apply under Part I:

(a) to any automobile while used as a public or livery conveyance, but this exclusion does not apply to the named insured with respect to bodily injury or property damage which results from the named insured's occupancy of a non-owned automobile other than as the operator thereof;

(b) to bodily injury or property damage caused intentionally at the direction of the insured;

(c) to bodily injury to any employee of the insured arising out and in the course of employment by the insured, but this exclusion does not apply with respect to any such injury arising out of and in the course of domestic employment by the insured unless benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

(d) to bodily injury to any fellow employee of the insured injured in the course of his employment if such injury arises out of the use of an automobile in the business of his employer, but this exclusion does not apply to the named insured with respect to injury sustained by any such fellow employee;

(e) to an owned automobile while used in the automobile business, but this exclusion does not apply to the named insured, a resident of the same household as the named insured, a partnership in which such resident or the named insured is a partner, or any partner, agent or employee of such resident or partnership;

(f) to a non-owned automobile while used (1) in the automobile business by the insured or (2) in any business or occupation of the insured, other than the automobile business, except a utility automobile not used for wholesale or retail delivery or a private passenger automobile operated or occupied by the named insured or a relative or by a private chauffeur or domestic servant of either, or a trailer used therewith;

(g) to injury to or destruction of property owned or transported by the insured or any automobile in charge of the insured.

PART II — EXPENSES FOR MEDICAL SERVICES

Coverage C — Medical Payments

To pay all reasonable expenses incurred within one year from the date of accident for necessary medical, surgical, X-ray and dental services, including prosthetic devices, and necessary ambulance, hospital, professional nursing and funeral services:

Division 1. To or for the named insured and each relative who sustains bodily injury, sickness or disease, including death resulting therefrom, hereinafter called "bodily injury," caused by accident, while occupying or through being struck by an automobile;

Division 2. To or for any other person who sustains bodily injury, caused by accident, while occupying

(a) the owned automobile, while being used by the named insured, by any resident of the same household or by any other person with the permission of the named insured; or

(b) a non-owned automobile, if the bodily injury results from (1) its operation or occupancy by the named insured or its operation on his behalf by his private chauffeur or domestic servant or (2) its operation or occupancy by a relative, but only with respect to an automobile not owned by such relative.

Definitions

The definitions under Part I apply to Part II, and under Part II:

"occupying" means in or upon or entering into or alighting from;

"an automobile" includes a trailer of any type.

Exclusions

This policy does not apply under Part II to bodily injury:

(a) sustained while occupying (1) an owned automobile while used as a public or livery conveyance, or (2) any vehicle while located for use as a residence or premises;

(b) sustained by the named insured or a relative (1) while occupying an automobile owned by the named insured, other than an owned automobile, or (2) while occupying or through being struck by (i) a vehicle operated on rails or crawler-treads, or (ii) a farm type tractor or other equipment designed for use principally off public roads, while not upon public roads;

(c) sustained by a relative while occupying an automobile owned by such relative;

(d) to any person other than the named insured or a relative, resulting from use of (1) a non-owned automobile in the automobile business or as a public or livery conveyance, or (2) a non-owned automobile in any business or occupation, other than the automobile business, except operation or occupancy of a utility automobile not used for wholesale or retail delivery or a private passenger automobile by the named insured or a relative, or by the private chauffeur or domestic servant of either, or of a trailer used therewith;

(e) to any person who is employed in the automobile business, if the accident arises out of the operation thereof and if benefits therefor are in whole or in part either payable or required to be provided under any workmen's compensation law;

(f) due to war.

PART III — PHYSICAL DAMAGE

Coverage D (1) — Comprehensive — Excluding Collision
(2) — Personal Effects

(1) To pay for loss caused other than by collision to the owned automobile or to a non-owned automobile. For the purpose of this coverage, breakage of glass and loss caused by missiles, falling objects, fire, theft or larceny, explosion, earthquake, windstorm, hail, water, flood, malicious mischief or vandalism, riot or civil commotion shall not be deemed to be loss caused by collision.

(2) To pay for loss caused other than by collision or by theft, larceny, robbery or pilferage, or attempt thereat, to robes, wearing apparel and other personal effects which are the property of the named insured or a relative, while such effects are in or upon the owned automobile.

Coverage E — Collision

To pay for loss caused by collision to the owned automobile or to a non-owned automobile but only for the amount of each such loss in excess of the deductible amount stated in the declarations as applicable hereto.

Coverage F — Towing and Labor Costs

To pay for towing and labor costs necessitated by the disablement of the owned automobile or of any non-owned automobile, provided the labor is performed at the place of disablement.

Supplementary Payments

In addition to the applicable limit of liability:

(a) to reimburse the insured for transportation expenses not exceeding $10 per day or totaling more than $300, incurred after a theft covered by this policy of the entire automobile has been reported to the Company and the police, and terminating when the Company tenders settlement for such theft;

(Part III—Physical Damage Continued on Page Three)

b) to pay general average and salvage charges for which the insured becomes legally liable, as to the automobile being transported.

Definitions

The definitions of "named insured," "owned automobile," "temporary substitute automobile," "private passenger automobile," "utility automobile," "automobile business," "relative" and "war" in Part I apply to Part III, and under Part III:

"insured" means the named insured and (a) with respect to the owned automobile, any person or organization maintaining, using or having custody of said automobile with the permission of the named insured; (b) any relative, but only with respect to an automobile not owned by such relative;

"non-owned automobile" means a private passenger automobile or trailer not owned by the named insured or any relative, other than a temporary substitute automobile, while said automobile or trailer is in the possession or custody of the insured or is being operated by him;

"loss" means direct and accidental loss of or damage to (a) the automobile, including its equipment, or (b) other insured property;

"collision" means collision of an automobile covered by this policy with another object or with a vehicle to which it is attached or by upset of such automobile;

"trailer" means a trailer designed for use with a private passenger automobile, if not being used for business purposes with other than a private passenger or utility automobile, and if not a home, office, store, display or passenger trailer.

Exclusions

This policy does not apply under Part III:

(a) to any automobile while used as a public or livery conveyance;

(b) to loss due to war;

(c) to loss to a non-owned automobile arising out of its use by the insured in the automobile business;

(d) to damage which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage results from a theft covered by this policy;

(e) to tires, unless damaged by fire, malicious mischief or vandalism, or stolen or unless the loss be coincident with and from the same cause as other loss covered by this policy;

(f) under coverage E, to breakage of glass if insurance with respect to such breakage is otherwise afforded.

CONDITIONS

1. Policy Period. Territory. This policy applies only to accidents, occurrences and loss during the policy period and within North America or any territory or possession of the United States of America, or between ports thereof.

2. Premium. If the named insured disposes of, acquires or replaces a private passenger or utility automobile or, with respect to Part III, a trailer, he shall inform the Company during the policy period of such change. Premium shall be adjusted as of the date of such change, in accordance with the manuals in use by the Company. The named insured shall, upon request, furnish reasonable proof of the number of such automobiles or trailers and a description thereof.

3. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

4. Limits of Liability

Part I. The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury sustained by one person as the result of any one occurrence; the limit of such liability stated in the declarations as applicable to "each occurrence" is, subject to the above provision respecting each person, the total limit of the Company's liability for all such damages arising out of bodily injury sustained by two or more persons as the result of any one occurrence.

The limit of property damage liability stated in the declarations as applicable to "each occurrence" is the total limit of the Company's liability for all damages arising out of injury to or destruction of all property of one or more persons or organizations, including the loss of use thereof, as the result of any one occurrence.

Part II. The limit of liability for medical payments stated in the declarations as applicable to "each person" is the limit of the Company's liability for all expenses incurred by or on behalf of each person who sustains bodily injury as the result of any one accident.

Part III. The limit of the Company's liability for loss shall not exceed the actual cash value of the property, or if the loss is of a part thereof the actual cash value of such part, at time of loss, nor what it would then cost to repair or replace the property or such part thereof with other of like kind and quality, nor the applicable limit of liability stated in the declarations; provided, however, the limit of the Company's liability (a) for loss to personal effects arising out of any one occurrence is $100, and (b) for loss to any trailer is $500.

5. Two or More Automobiles. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each, but an automobile and a trailer attached thereto shall be held to be one automobile as respects limits of liability under Part I of this policy, and separate automobiles under Part III of this policy, including any deductible provisions applicable thereto.

6. Assistance and Cooperation of the Insured — Parts I and III. The insured shall cooperate with the Company and, upon the Company's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

7. Action Against Company

Part I. No action shall lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

Any claimant or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No claimant shall have any right under this policy to join the Company as a party to any action against the insured to determine the insured's liability, nor shall the Company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Company of any of its obligations hereunder.

Parts II and III. No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all the terms of this policy nor, under Part III, until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy.

8. Financial Responsibility Laws — Part I. When this policy is certified as proof of financial responsibility for the future under the provisions of any motor vehicle financial responsibility law, such insurance as is afforded by this policy for bodily injury liability or for property damage liability shall comply with the provisions of such law to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy.

9. Medical Reports: Proof and Payment of Claim — Part II. As soon as practicable the injured person or someone on his behalf shall give to the Company written proof of claim, under oath if required, and shall, after each request from the Company, execute authorization to enable the Company to obtain medical reports and copies of records. The injured person shall submit to physical examination by physicians selected by the Company when and as often as the Company may reasonably require.

The Company may pay the injured person or any person or organization rendering the services and such payment shall reduce the amount payable hereunder for such injury. Payment hereunder shall not constitute an admission of liability of any person or, except hereunder, of the Company.

10. Insured's Duties in Event of Loss

Part I. In the event of loss of earnings for which reimbursement is sought under paragraph (e) of "Supplementary Payments" the insured shall:

file with the Company, as soon as practicable after loss, his sworn proof of loss in such form and including such information as the Company may reasonably require and shall, upon the Company's request, exhibit earnings' statements or other related material and submit to examination under oath.

Part III. In the event of loss the insured shall:

(a) protect the automobile, whether or not the loss is covered by this policy, and any further loss due to the insured's failure to protect

(Conditions Continued on Page Four)

(Conditions. Continued from Page Three)

shall not be recoverable under this policy; reasonable expenses incurred in affording such protection shall be deemed incurred at the Company's request;

(b) file with the Company, as soon as practicable after loss, his sworn proof of loss in such form and including such information as the Company may reasonably require and shall, upon the Company's request, exhibit the damaged property and submit to examination under oath.

11. Appraisal — Part III. If the insured and the Company fail to agree as to the amount of loss, either may, within sixty days after proof of loss is filed, demand an appraisal of the loss. In such event the insured and the Company shall each select a competent appraiser, and the appraisers shall select a competent and disinterested umpire. The appraisers shall state separately the actual cash value and the amount of loss and failing to agree shall submit their differences to the umpire. An award in writing of any two shall determine the amount of loss. The insured and the Company shall each pay his chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The Company shall not be held to have waived any of its rights by any act relating to appraisal.

12. Payment of Loss — Part III. The Company may pay for the loss in money; or may repair or replace the damaged or stolen property; or may, at any time before the loss is paid or the property is so replaced, at its expense return any stolen property to the named insured, or at its option to the address shown in the declarations, with payment for any resultant damage thereto; or may take all or such part of the property at the agreed or appraised value but there shall be no abandonment to the Company. The Company may settle any claim or loss either with the insured or the owner of the property.

13. No Benefit to Bailee — Part III. The insurance afforded by this policy shall not inure directly or indirectly to the benefit of any carrier or bailee liable for loss to the automobile.

14. Subrogation — Parts I and III. In the event of any payment under this policy, the Company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

15. Other Insurance

Parts I and III. If the insured has other insurance against a loss covered by Part I or Part III of this policy, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance shall be excess insurance over any other valid and collectible insurance with respect to (1) a temporary substitute automobile or a non-owned automobile, and (2) under Part I, loss against which the named insured has other insurance disclosed to the Company as in effect on the effective date of this policy and upon the basis of which the premium for the insurance under this policy is modified, but in such event the insurance under this policy shall apply only in the amount by which the applicable limit of liability stated in the declarations exceeds the applicable limit of liability of such other insurance.

Part II. The insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance over any other valid and collectible automobile medical payments insurance, but this provision does not apply to the named insured or any relative.

16. Changes. Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

17. Assignment. Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon; if, however, the insured named in item 1 of the declarations, or his spouse if a resident of the same household, shall die, this policy shall cover (1) the survivor as named insured, (2) his legal representative as named insured but only while acting within the scope of his duties as such, (3) any person having proper temporary custody of an owned automobile, as an insured, until the appointment and qualification of such legal representative, and (4) under division 1 of Part II any person who was a relative at the time of such death.

18. Cancellation. This policy may be cancelled by the insured named in item 1 of the declarations by surrender thereof to the Company or any of its authorized agents or by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the insured named in item 1 of the declarations at the address shown in this policy written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of the surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. Delivery of such written notice either by such insured or by the Company shall be equivalent to mailing.

If such insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the Company cancels, earned premium shall be computed pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

19. Terms of Policy Conformed to Statute. Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes.

20. Declarations. By acceptance of this policy, the insured named in item 1 of the declarations agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

IN WITNESS WHEREOF, AMERICAN AUTOMOBILE INSURANCE COMPANY has caused this policy to be signed by its President and Secretary, but the same shall not be binding upon the Company unless it has been countersigned on the declarations page by a duly authorized agent of the Company.

Archer O'Kelly Jr.
SECRETARY

HARRY M. HULL, Clerk

AUG 4 1965

FILED

Robt Z Alexander
PRESIDENT

KANSAS ENDORSEMENT (Applicable only if the owned automobile is principally garaged in the State of Kansas):

It is agreed that:

1. In the "Insured's Duties in Event of Loss" Condition, paragraph (a) is amended to read:

"(a) use every reasonable means to protect the automobile (whether or not the loss is covered by this policy) from further loss; reasonable expenses incurred in affording such protection shall be deemed incurred at the Company's request;"

2. In the "Appraisal" Condition, the term "30 days" is substituted for "60 days."

AMERICAN AUTOMOBILE INSURANCE COMPANY
AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY

DECLARATIONS

ITEM 1. NAME AND ADDRESS OF INSURED (NUMBER, STREET, TOWN, COUNTY, STATE)

POLICY NUMBER A-168 6119

DORIS V. OSBORNE
CO. A TRAINING BATTALION
FORT MC CLELLAN
CALHOUN CO., ALABAMA

ITEM 2a. THE AUTOMOBILE WILL BE PRINCIPALLY GARAGED IN THE TOWN, COUNTY AND STATE INDICATED IN THE ADDRESS OF THE NAMED INSURED, UNLESS OTHERWISE STATED HEREIN:

ITEM 2b. IF NO AUTOMOBILE IS DESCRIBED HEREIN, THE TOTAL NUMBER OF PRIVATE PASSENGER AUTOMOBILES OWNED ON THE EFFECTIVE DATE OF THIS POLICY BY THE NAMED INSURED AND BY HIS SPOUSE, IF A RESIDENT OF THE SAME HOUSEHOLD, DOES NOT EXCEED ONE, UNLESS OTHERWISE STATED HEREIN:

ITEM 2c. OCCUPATION OF THE NAMED INSURED IS (IF MARRIED WOMAN, INCLUDE HUSBAND'S OCCUPATION)

PVT. W.A.C.

ITEM 3. POLICY PERIOD

FROM JUNE 3, 1957 TO JUNE 3, 1958 12:01 A. M., STANDARD TIME AT THE ADDRESS OF THE NAMED INSURED AS STATED HEREIN.

ITEM 4. DESCRIPTION OF THE AUTOMOBILE AND FACTS RESPECTING ITS PURCHASE BY THE NAMED INSURED OR SPOUSE:

MODEL YEAR	TRADE NAME AND BODY TYPE	MODEL SERIES	MOTOR NUMBER, SERIAL NUMBER OR IDENTIFICATION NUMBER	DATE PURCHASED	LIST PRICE	ACTUAL COST	NEW OR USED
52	CHEV. 2DR. SDN. DEL.		55KK57972	11-53	G-31	1400	N

ITEM 5. THE AUTOMOBILE IS UNENCUMBERED UNLESS OTHERWISE STATED HEREIN:

ENCUMBRANCE	NUMBER OF INSTALLMENTS	AMOUNT OF EACH	FINAL INSTALLMENT DUE DATE	FINAL INSTALLMENT AMOUNT
$		$		$

NAME ADDRESS

ANY LOSS UNDER COVERAGES D AND E IS PAYABLE AS INTEREST MAY APPEAR TO THE NAMED INSURED AND

ITEM 6. THE INSURANCE AFFORDED IS ONLY WITH RESPECT TO SUCH AND SO MANY OF THE FOLLOWING COVERAGES AS ARE INDICATED BY SPECIFIC PREMIUM CHARGE OR CHARGES. THE LIMIT OF THE COMPANY'S LIABILITY AGAINST EACH SUCH COVERAGE SHALL BE AS STATED HEREIN, SUBJECT TO ALL THE TERMS OF THIS POLICY HAVING REFERENCE THERETO.

COVERAGES	LIMITS OF LIABILITY		PREMIUMS
A. BODILY INJURY LIABILITY	$ 25,000	EACH PERSON	
	$ 50,000	EACH OCCURRENCE	$ 24.48
B-1. BASIC MEDICAL PAYMENTS	$ 500	EACH PERSON	5.00
B-2. EXTENDED MEDICAL PAYMENTS	$	EACH INSURED	
C. PROPERTY DAMAGE LIABILITY	$ 5,000	EACH OCCURRENCE	12.00
ENDORSEMENTS ATTACHED			
	AMERICAN AUTOMOBILE INSURANCE COMPANY—TOTAL PREMIUM		$ 41.48
D. COMPREHENSIVE LOSS OF OR DAMAGE TO THE AUTOMOBILE EXCEPT BY COLLISION (BUT INCLUDING FIRE, THEFT AND WINDSTORM)	ACTUAL CASH VALUE $		$ 8.00
E. COLLISION OR UPSET	ACTUAL CASH VALUE LESS $ 50	DEDUCTIBLE	43.00
F. TOWING AND LABOR COSTS	$ 10	FOR EACH DISABLEMENT	1.00
ENDORSEMENTS ATTACHED			
	AMERICAN AUTOMOBILE FIRE INSURANCE COMPANY—TOTAL PREMIUM		$ 52.00
	BOTH COMPANIES—TOTAL PREMIUM		$ 93.48

ITEM 7. THE PREMIUM FOR THE POLICY IS TO BE PAID IN INSTALLMENTS ON THE DUE DATES, AS FOLLOWS:

DUE DATE			SUB-TOTAL A. A. INS. CO.			SUB-TOTAL A. A. FIRE INS. CO.	TOTAL PREMIUM BOTH CO'S.

DATE OF ISSUE: MAY 20, 1957

COUNTERSIGNATURE OF AUTHORIZED AGENT: Louis H. Antoine

THIS DECLARATIONS PAGE IS ISSUED IN CONJUNCTION WITH AND IS A PART OF POLICY FORM 5358—4-55

It is agreed that: ITEM #1, ADDRESS OF INSURED IS AMENDED TO READ:

WAC DET. #2
U. S. ARMY GARRISON
FORT MC PHERSON, GA.

ADDITIONAL OR RETURN PREMIUM DUE ON THE EFFECTIVE DATE OF THIS ENDORSEMENT							
COVERAGE	BOD. INJ.	PROP. DAM	MED		COMP		TOTAL
ADDITIONAL PREMIUM	$ 2.72	$ 4.00	$ 1.00	$	$ 1.00	$	$ 8.72
RETURN PREMIUM	$	$	$	$	$	$	$
SUB-TOTALS:	AUTO. CASUALTY	ADD'L.	$ 7.72	AUTO. MAT. DAM.	ADD'L.	$ 1.00	X X X X
		RETURN	$		RETURN	$	

ALL ANNIVERSARY PREMIUMS OF THE POLICY OR BOND WHICH ARE PAYABLE SUBSEQUENT TO THE EFFECTIVE DATE OF THIS ENDORSEMENT ARE AMENDED AS FOLLOWS:

	INCREASE	DECREASE	REVISED ANNIVERSARY PREMIUMS
NEXT ANNIVERSARY	$	$	$
ALL SUBSEQUENT ANNIVERSARIES	$	$	$

POLICY OR BOND NUMBER	INSURED	EFFECTIVE
A-168 6119	DORIS V. OSBORNE	6-3-57

THE AMERICAN INSURANCE COMPANY
ASSOCIATED INDEMNITY CORPORATION
AMERICAN AUTOMOBILE INSURANCE COMPANY

Baz Alexander
PRESIDENT

PRODUCER
MARKHAM #1
COUNTERSIGNATURE OF AUTHORIZED AGENT

Lucie H Watson

7651—7-57

ADDITION, ELIMINATION OR SUBSTITUTION OF AUTOMOBILE

It is agreed that as of the effective date hereof the policy is amended in the following particulars:

I. AUTOMOBILE ADDED

TO AFFORD INSURANCE WITH RESPECT TO THE AUTOMOBILE DESCRIBED IN THIS DIVISION, SUBJECT TO ALL THE TERMS OF THE POLICY EXCEPT AS SPECIFICALLY AMENDED HEREIN.

DESCRIPTION OF OWNED AUTOMOBILE OR TRAILER (REQUIRED ONLY IF COVERAGE D, E, G, H OR I IS AFFORDED):

MODEL YEAR	TRADE NAME AND BODY TYPE	MODEL SERIES	MOTOR NUMBER, SERIAL NUMBER OR IDENTIFICATION NUMBER	DATE PURCHASED	LIST PRICE	ACTUAL COST	NEW OR USED
57	CHEV. 2DR. SDN.	6	A57A196103	7-57	$	$2271.	N

THE AUTOMOBILE WILL BE PRINCIPALLY GARAGED IN THE TOWN, COUNTY AND STATE AS SHOWN IN THE ADDRESS OF THE INSURED IN THE POLICY, UNLESS OTHERWISE STATED HEREIN:

ANY LOSS UNDER PART III IS PAYABLE AS INTEREST MAY APPEAR TO THE NAMED INSURED AND — NAME — ADDRESS

THE TOTAL NUMBER OF PRIVATE PASSENGER AND UTILITY AUTOMOBILES OWNED ON THE EFFECTIVE DATE OF THIS ENDORSEMENT BY THE NAMED INSURED DOES NOT EXCEED ONE, UNLESS OTHERWISE STATED HEREIN.

II. AUTOMOBILE ELIMINATED

TO DISCONTINUE INSURANCE WITH RESPECT TO THE AUTOMOBILE DESIGNATED BELOW BY (X):

( ) DESCRIBED IN THE DECLARATIONS ( ) DESCRIBED AS ITEM OF SCHEDULE ( ) DESCRIBED AS FOLLOWS:

MODEL YEAR	TRADE NAME	MOTOR NUMBER, SERIAL NUMBER OR IDENTIFICATION NUMBER

III. SCHEDULE OF COVERAGES

THE INSURANCE AFFORDED FOR THE ADDED AUTOMOBILE IS ONLY WITH RESPECT TO SUCH OF THE FOLLOWING COVERAGES AS ARE INDICATED BY AN ADDITIONAL OR RETURN PREMIUM OR THE WORDS "NO CHARGE" IN THE PREMIUM COLUMN. THE LIMIT OF THE COMPANY'S LIABILITY AGAINST EACH SUCH COVERAGE SHALL BE AS STATED HEREIN, SUBJECT TO ALL THE TERMS OF THE POLICY HAVING REFERENCE THERETO.

COVERAGES	LIMITS OF LIABILITY	PREMIUMS ADDITIONAL	PREMIUMS RETURN
A BODILY INJURY LIABILITY	$ 25,000 EACH PERSON $ 50,000 EACH OCCURRENCE	$ NO	$
B PROPERTY DAMAGE LIABILITY	$ 5,000 EACH OCCURRENCE		
C. AUTOMOBILE MEDICAL PAYMENTS	$ 500 EACH PERSON	CHG	
ENDORSEMENTS			
	SUB-TOTAL	$	$
D. (1) COMPREHENSIVE—EXCLUDING COLLISION	ACTUAL CASH VALUE		
(2) PERSONAL EFFECTS	$ 100	CANC	7.21
E. COLLISION	ACTUAL CASH VALUE LESS $ 50 DEDUCTIBLE	CANC	38.74
F. TOWING AND LABOR COSTS	$ 10 PER DISABLEMENT	CANC	.90
G. FIRE, LIGHTNING AND TRANSPORTATION	$		
H. THEFT	$		
I. COMBINED ADDITIONAL COVERAGE	$		
ENDORSEMENTS			
	SUB-TOTAL	$	$46.85
	TOTAL PREMIUM	$	46.85

POLICY NUMBER	INSURED	EFFECTIVE
A-168 6119	DORIS V. OSBORNE	7-9-57

THE AMERICAN INSURANCE COMPANY
ASSOCIATED INDEMNITY CORPORATION
AMERICAN AUTOMOBILE INSURANCE COMPANY

Boaz Alexander
PRESIDENT

50-X

PRODUCER
MARKHAM #1
COUNTERSIGNATURE OF AUTHORIZED AGENT
Louis H. Antonini

2133—7-57

SUBSTITUTION OF AUTOMOBILE

IT IS AGREED THAT AS OF THE EFFECTIVE DATE HEREOF THE POLICY IS AMENDED IN THE FOLLOWING PARTICULARS:

1. TO AFFORD INSURANCE WITH RESPECT TO THE AUTOMOBILE DESCRIBED AS FOLLOWS:

MODEL YEAR	TRADE NAME AND BODY TYPE TRUCK SIZE OR TANK GALLONAGE	MODEL SERIES	MOTOR NUMBER, SERIAL NUMBER OR IDENTIFICATION NUMBER	DATE PURCHASED	LIST PRICE	ACTUAL COST	NEW OR USED
57	CHEV 4DR.		M# A57A197409				

2. TO DISCONTINUE INSURANCE WITH RESPECT TO THE AUTOMOBILE DESIGNATED BELOW BY (X):

(X) DESCRIBED IN THE DECLARATIONS

( ) DESCRIBED AS ITEM OF SCHEDULE

( ) DESCRIBED AS FOLLOWS:

MODEL YEAR	TRADE NAME	MOTOR NUMBER, SERIAL NUMBER OR IDENTIFICATION NUMBER
57	CHEV. 2DR.	A57A196103

THE NAMED INSURED IS THE SOLE OWNER OF THE AUTOMOBILE, EXCEPT AS STATED HEREIN:

POLICY NUMBER	INSURED	EFFECTIVE
A-168 6119	DORIS V. OSBORNE	11-26-57

THE AMERICAN INSURANCE COMPANY
ASSOCIATED INDEMNITY CORPORATION
AMERICAN AUTOMOBILE INSURANCE COMPANY

Boaz Z Alexander
PRESIDENT . 50-X

PRODUCER
MARKHAM #1
COUNTERSIGNATURE OF AUTHORIZED AGENT
Louis H. Pontiere

1962—7-57

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19,715

EDYTHE F. WATERS,

Appellant,

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY,

Garnishee-Appellee.

PETITION FOR REHEARING EN BANC OR IN

THE ALTERNATIVE A REHEARING BEFORE THE DIVISION

The direction of a verdict against appellant at the close of her case was affirmed by a division of this Court on June 14, 1966. The appellant petitions the Court to rehear this case en banc or in the alternative a rehearing before the same division of the Court for further consideration hereof, and for grounds of this petition states as follows:

> The division's opinion plainly demonstrates that affirmance was based upon an erroneous interpretation of the applicable law of the State of Missouri, as well as the previously accepted law of the District of Columbia.

Upon rehearing it is requested that the judgment be reversed and entered in the favor of petitioner.

> THE DIVISION'S OPINION PLAINLY DEMONSTRATES THAT AFFIRMANCE WAS BASED UPON AN ERRONEOUS INTERPRETATION OF THE APPLICABLE LAW OF THE STATE OF MISSOURI, AS WELL AS THE PREVIOUSLY ACCEPTED LAW OF THE DISTRICT OF COLUMBIA.

There is no question that appellee insurance company did receive notice of the accident in question. At worst, notice was received approximately seven and one-half months after the accident, though notice allegedly may have

been given through the military or upon the substitution of automobile. However, the question which does arise is whether or not appellee-garnishee was required to show that the liability policy in the instant case contained a provision for forfeiture as required by the laws of the State of Missouri, or that it was prejudiced by the late notice which it did receive. In the opinion of the division, it does not appear as though the division followed the long line of Missouri cases upon which the Eighth Circuit Court of Appeals based their decisions in Western & Sur. Co. v. Coleman, 186 f. 2d 40 (8th Cirr. 1950) and Hawkeye - Security Inc. Co. v. Davis 277 F. 2d 765 (8th Cirr. 1960). Both cases, as recognized by the division, support the appellant's position that "condition precedent" was not a forfeiture clause. The division chose instead to follow an individual case decided by an intermediate Missouri Court of Appeals, Northwestern Mutual Ins. Co. v. Independence Mutual Ins. Co. 319 S. W. 2d 898 (1959). Apparently overlooked is the fact that the Northwestern Mutual case, supra did not involve the notice provision at all, but was decided upon the cooperation provision in the policy at issue.

The highest Court of the State of Missouri, the Supreme Court of Missouri, had an opportunity to comment on the Eighth Circuit cases, as well as the Northwest Mutual case, supra in Meyer v. Smith, 375 S. W. 2d 9 (1964), and seems to have viewed it differently from the interpretation of the division. Referring to the Northwestern Mutual case, supra the Court at page 16 pointed out the two inconsistent positions in Northwestern Mutual, supra

> "'In assessing insured's conduct it is not necessary for appellant [the garnishee] to show that insured's conduct resulted in prejudice to the insurer, in view of the fact that Condition 2 constituted a condition precedent. * * * Even so, insured's lack of cooperation, to exonerate insurer, must have been in some substantial and material respect. Lack of cooperation in an inconsequential or immaterial matter or manner will not justify a disclaimer of liability under the policy. If insured, however was guilty of lack of cooperation in a substantial and material respect, Northwestern cannot enforce the policy because Northwestern [the subrogee of the injured party] stands in the shoes of the insured. Its rights are derivative. * * * While it appears that insured's cooperation was not hearty, fulsome or cheerfully given, the insurer was duly notified of the occurrence of the accident. * * *' However, at 319 S.W.2d 898, 902, the same Court in the same case also stated: 'Where the condition [breached] is expressly made a condition precedent, the insurer is relieved of liability whether or not the

> insurer has been injured or prejudiced by the breach of condition.'"

Therefore, the Court in Northwestern Mutual indicates at page 902 that the breach a condition precedent relieves the liability of the insurer, but comes right back on page 905 and states that a lack of cooperation in an immaterial matter will not justify a disclaimer, even though the words condition precedent are set forth!

Continuing further with the Mever case, supra which appears to be the most recent case on point cited by the appellant or appellee-garnishee, the Court quoted most favorably from two additional Federal cases directly on point, as follows: (page 16) -

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'The rule of law announced in Northwestern Mutual is in direct conflict with our understanding of the applicable Missouri law based upon the Missouri decisions as reflected by our opinion in Western Casualty & Surety Co. case. Prior Missouri decisions reflect a great reluctance on the part of the Missouri courts to find nonliability on a policy because of violation of policy conditions in the absence of a showing of prejudice to the insurer. The court in Northwestern Mutual makes no attempt to reconcile its holding with the prior Missouri cases or to distinguish such cases. It is possible that the Supreme Court of Missouri, when confronted with a problem such as here presented, may follow the St. Louis Court of Appeals decision in the Northwestern Mutual case. However, such a result is by no means forecast by the previous decisions of the Missouri courts.'"

In its opinion, the division felt that the Missouri Supreme Court in the Meyers case, supra there were "no clear signals" given as to the approval or disapproval of the Eighth Circuit cases. However, the fact of the matter appears to be that Meyers, supra appears to reject Northwestern Mutual, supra in favor of the Western Casualty and Hawkeye-Security cases! This is especially important when considering the fact when both the Western Casualty and Hawkeye-Security cases, supra are specific cases on notice, and both cases involve an insurance policy using the specific words, "condition precedent." Furthermore, Hawkeye-Security,

supra is verbatim the same as the policy in the instant case with regard to the paragraphs entitled "Notice," and "Action Against Company." It is extremely difficult to see how the division of this Court has refused to disregard those two cases, and instead relies upon Northwestern Mutual which has absolutely nothing whatsoever to do with notice.

Furthermore, the division appears to have changed the accepted law of the District of Columbia, which appellant has always contended is contrary to the ruling of the Trial Court and the present ruling of this Court. Prior to the present opinion, the accepted law even in this jurisdiction on the direct issue in this case was stated in the case of Lee v. Travelers Ins. Co., 184 A.2d 636 (1962), which is cited at page 6 of the Reply Brief filed in this case by appellant. In the Lee case, supra Chief Judge Hood at page 639 found against the garnishee insurance company by stating:

> "In reaching our conclusion, we are influenced by the present-day tendency to regard insurance of the type here involved as not a strictly private contract between insurer and insured but a contract for the benefit of the public. This tendency is reflected in our Motor Vehicle Safety Responsibility Act, (footnote omitted) and also in the Compulsory In-

> surance, Financial Responsibility and unsatisfied judgment statutes of other jurisdictions. Owners and operators of automobiles are encouraged and sometimes compelled to carry liability insurance to protect the public. Giving due consideration to the two-fold purpose of all automobile liability insurance - protection of both the insured and the public - it does not appear reasonable to allow the insured to escape liability to an injured member of the public, merely because the insured, through ignorance, indifference, or willfulness has failed to comply with the provisions of the policy unless such non-compliance has materially harmed the insurer." (Emphasis supplied)

It is to be noted that the Lee case, supra has the identical provisions as here involved.

Appellant has never stated that the law of this jurisdiction was contrary to the law of Missouri, but has always contended that the law of that state was controlling and that its decision more emphatically supported appellant's position. The cases cited by the division in support of its views of the law of this jurisdiction are not automobile notice cases; each of them involve fire or theft policies having a specified number of days in which to give notice. The question in those cases was one of waivier and estoppel. The relationship did not involve the public, but merely the insured and the insurer.

It appears that in all of the materially involved cases, the appeals came at the conclusion of a full trial rather than at the end of plaintiff's case as in the present case. This Court has on numerous occasions set forth a strict criteria for the granting (and affirming) of a motion for a Directed verdict at the end of the plaintiff's case. But in the present case the division has allowed a direction of the verdict before a showing of any difficulty in investigating the accident, the unavailability of any witness, any uncertainty of any source of information, or that the appellant's claim is fraudulent or that there was any collusion or that settlement was any more difficult. In fact, none of these could have been shown.

CONCLUSION

The Lee v. Travelers case, supra appears to hold a garnishee liable in automobile cases where there is noncompliance, unless the garnishee can show that it was materially harmed. This appears to be so even though the magic words, "condition precedent" are used. Also, in all of the cases involving Missouri law and dealing specifically with notice, the Court has held that the words "condition precedent" do not act

as a forfeiture clause. To by-pass the above, as the division has done, appears to have no foundation in precedent or reason. The affirmance of the Dictrict Court's ruling would over-rule the present law of not only the District of Columbia, but also that of the State of Missouri. For these reasons, appellant asks that the Court re-hear the present case en banc or in the alternative a re-hearing before the division.

Respectfully submitted,

LEONARD Z. BULMAN
750 Washington Building
Washington, D.C. 2005
ATTORNEY FOR APPELLANT

CERTIFICATE OF GOOD FAITH

I hereby certify that this petition is presented in good faith and not for delay.

LEONARD Z. BULMAN

CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition was mailed to Denver H. Graham, Esquire, 1314 19th Street, N.W., Washington, D.C., Attorney for Appellee, this day of June, 1966.

LEONARD Z. BULMAN

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 19,715

EDYTHE F. WATERS,

Appellant,

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY,

Garnishee-Appellee.

PETITION FOR REHEARING EN BANC OR IN

THE ALTERNATIVE A REHEARING BEFORE THE DIVISION

The direction of a verdict against appellant at the close of her case was affirmed by a division of this Court on June 14, 1966. The appellant petitions the Court to rehear this case en banc or in the alternative a rehearing before the same division of the Court for further consideration hereof, and for grounds of this petition states as follows:

> The division's opinion plainly demonstrates that affirmance was based upon an erroneous interpretation of the applicable law of the State of Missouri, as well as the previously accepted law of the District of Columbia.

Upon rehearing it is requested that the judgment be reversed and entered in the favor of petitioner.

> THE DIVISION'S OPINION PLAINLY DEMONSTRATES THAT AFFIRMANCE WAS BASED UPON AN ERRONEOUS INTERPRETATION OF THE APPLICABLE LAW OF THE STATE OF MISSOURI, AS WELL AS THE PREVIOUSLY ACCEPTED LAW OF THE DISTRICT OF COLUMBIA.

There is no question that appellee insurance company did receive notice of the accident in question. At worst, notice was received approximately seven and one-half months after the accident, though notice allegedly may have

been given through the military or upon the substitution of automobile. However, the question which does arise is whether or not appellee-garnishee was required to show that the liability policy in the instant case contained a provision for forfeiture as required by the laws of the State of Missouri, or that it was prejudiced by the late notice which it did receive. In the opinion of the division, it does not appear as though the division followed the long line of Missouri cases upon which the Eighth Circuit Court of Appeals based their decisions in Western & Sur. Co. v. Coleman, 186 f. 2d 40 (8th Cirr. 1950) and Hawkeye - Security Inc. Co. v. Davis 277 F. 2d 765 (8th Cirr. 1960). Both cases, as recognized by the division, support the appellant's position that "condition precedent" was not a forfeiture clause. The division chose instead to follow an individual case decided by an intermediate Missouri Court of Appeals, Northwestern Mutual Ins. Co. v. Independence Mutual Ins. Co. 319 S. W. 2d 898 (1959). Apparently overlooked is the fact that the Northwestern Mutual case, supra did not involve the notice provision at all, but was decided upon the cooperation provision in the policy at issue.

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LEONARD Z. BULMAN

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,715

EDYTHE F. WATERS,

Appellant,

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY,

Garnishee-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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REPLY BRIEF FOR APPELLANT

SUMMARY OF ARGUMENT

The law of the State of Missouri does not preclude an insurer from liability in force at the time of an accident because "reasonable" notice is not given unless there is a definite and specific forfeiture clause in the policy.

The question of sole or joint ownership of an automobile in a state which was a "non-title" state at the time in question is a jury question. The Trial Court in order to grant a directed verdict at the close of the

Plaintiff's case is required to construe the evidence most favorably for the Plaintiff. Where there is more than one possible conclusion, the jury must decide this question of fact.

There was no evidence introduced to show, as a matter of law, that the insured-defendant had breached the "cooperation" clause of her policy.

ARGUMENT

I.

With Reference to Notice, Missouri Law Was Considered the Applicable Law at All Stages of the Case and Properly So

Garnishee, throughout his entire Brief, appears to put forth the allegation that the idea of applying Missouri law is presented to this Court for the first time. This is, of course, not correct.

While the facts in the given case may vary, the proper law to be applied does not. As shown in Argument I, B, of Appellant's Brief, pages 10 to 14, Missouri law is the appropriate law in this case.

In the Pretrial Proceeding, made a part of Appellee's Brief, at page 1 a, it is stated:

> ". . . [T]he policy of insurance was issued by Garnishee in Missouri and mailed by its agent from Missouri to the insured, who was temporarily stationed at Fort McClellan, Alabama."

Furthermore, nowhere in the Pretrial Proceedings (A.A. 1a-7a) is there a stipulation or mandate to counsel to file a Trial Brief. It is acknowledged that Garnishee, who had put forth several grounds on which it had attempted to avoid liability under the policy, did file "Pretrial Brief of the Law." This Brief is not a part of the record before this Court, nor was it before the Trial Court.

Garnishee makes mention of this Trial Brief in its Opposition to Motion for New Trial (J.A. 10) in referring to page 16 of the Trial Brief, where it is stated:

> ". . . Since the policy in question was delivered to the insured by mailing the same to her from Missouri, the Missouri law should control. In absence of an expressed stipulation to the contrary, the law of the place where the contract was consummated applies and the contract is usually considered to be consummated or completed by the delivery of the policy." (Emphasis supplied)

Therefore, it is clear that the law of no other state was ever considered to be applicable to the substantive question in this case. Since the Court's direction of a verdict was not consistent with the applicable law as heretofore shown in Appellant's Brief, this Court should reverse the verdict of the District Court.

Garnishee appears to take great pains in attempting to set aside the St. Louis Court of Appeals case of *Walker, to the Use of Foristel v. American Automobile Ins. Co.*, 70 S.W.2d 82 (1934). However, the Court specifically states on page 88 that specific and unambiguous language to work a forfeiture must be used before the courts of Missouri will avoid liability for failure to give notice within the time stipulated, unless the insurer shows prejudice upon its part. Though the words "condition precedent" were not used in this exact matter, nevertheless, the Court pointed out that this was a provision in the policy trying to avoid the liability of the insurer.

Even the case of *Hope Spoke Company v. Maryland Casualty Co.*, 102 Ark. 1, 143 S.W. 85, 88, 38 L.R.A. (N.S.) 62, Ann. Cas. 1914 A, 268, appears to be in point with the Plaintiff's position. In discussing as *dicta* the words "condition precedent," nevertheless, it still must be shown that the failure of a Plaintiff to give immediate notice materially affects the rights of the insurer.

The Plaintiff in the present matter still feels that the *Walker* case, supra, being the latest case in the St. Louis Court of Appeals, should prevail as the leading case law in the case presently at issue. The Court very definitely set out that the insurance company, as the author of the policy, would have the right to place a clause within the policy to the effect that if notice is not given within a certain definite period of time, that the insured will forfeit any and all rights which he might have under the policy. This the Garnishee has failed to do, but now asks this Court to incorporate this forfeiture clause in the policy itself.

It is to be noted that Garnishee cites a 1959 case, *Northwestern Mutual Insurance Co. v. Independence Insurance Co.*, 319 S.W.2d 898. However, a close look at this case shows that the conditions involved (being Conditions 2, 6 and 16) do not apply to notice at all. Provision 2 states that all suit papers should be forwarded immediately to the insurance company (which they were in the instant case); Provision 16 states that the insured shall cooperate, attend hearings, etc. (which the Defendant did in the instant case); and Provision 6 states that no claim will lie against the insurance company unless the insured shall have complied with all provisions (which the Defendant did in the instant case).

The same situation also is set forth in *Donlon v. American Motorists, Inc.*, 147 S.W.2d 176 (Motion for Rehearing Overruled, 149 S.W.2d 378). This case again has nothing to do with notice, but does deal directly with the sending of the suit on to the insurer. As a matter of fact, the Court pointed out that the accident was reported "within a few days after its happening."

There are further cases cited by the Garnishee, but they either appear to be in favor of the Plaintiff or do not apply to notice whatsoever. The latest Federal case which appears to interpret the Missouri law pertaining to notice appears to be *Hawkeye - Security Ins. Co. v.*

Davis, 277 F.2d 765 (8th Cir. 1960). The language under the paragraph "Notice" and "Action Against Company" are verbatim the language in the policy at issue. Therefore, it is felt that this case ought to be given special consideration in determining the appeal at bar. In that case, notice was not given for some sixty-five days. However, the Court reaffirmed the Missouri cases after a substantial review of prior Missouri decisions that failure of an insured to give notice will not defeat his rights unless there is a provision of forfeiture, and there being no provision of forfeiture, the insurer was held to be liable.

Counsel for the Garnishee feels that the Judges hearing the case of *Hawkeye - Security Ins. Co. v. Davis*, supra, "either did not understand"the situation, or just blindly adopted the lower court decision. To substantiate his reasoning, he sets forth a case (*Hartford Accident & Indemnity Co. v. Lochmandy Buick Sales, Inc.*, 302 F.2d 565, which happens to be a 7th Circuit Court of Appeals case rather than an 8th Circuit Court of Appeals case.)

In essence, and as admitted by the Garnishee in its Brief, the insurance company has the burden of proving a breach of the cooperation condition; and the insurer further has the burden of proving, under the Missouri law, that if notice is not reasonably given, the insured will forfeit his rights under the policy.

Since it is felt that the law of Missouri does control, it would be folly to discuss the law of the District of Columbia or elsewhere in the United States.

Appellee puts forth in his Brief the fact that notice was not given for eight months.

This is contrary to the facts and the testimony of the Plaintiff and the Defendant in the suit. The Defendant stated that she had requested someone at the army hospital to report the accident to her insurance company for her. (J.A. 39) On November 26, 1957, the Garnishee in-

surance company issued another substitution of automobile on the subject policy after being notified that the previous car had been a total loss (J.A. 68), and the acknowledged receipt of notice from Mr. Rosenthal, if not the earlier attorney, in April, 1958. It is settled law that the notice need not be received directly from the insured. *Lee v. Travelers Insurance Co.*, 184 A.2d 636 (1962), citing annotations in 18 A.L.R. 2d 443, 458.

In the case of *Lee v. Travelers Insurance Co.*, supra, after finding that the insurance company had received appropriate notification of the accident, investigated the accident, but did not receive the suit papers, the Court held the Garnishee liable. In this case, Chief Judge Hood, speaking for the Municipal Court of Appeals, stated the law in this jurisdiction, as in most others, to be the following:

> "In reaching our conclusion, we are influenced by the present-day tendency to regard insurance of the type here involved as not a strictly private contract between insurer and insured but a contract for the benefit of the public. This tendency is reflected in our Motor Vehicle Safety Responsibility Act, (footnote omitted) and also in the Compulsory Insurance, Financial Responsibility and unsatisfied judgment statutes of other jurisdictions. Owners and operators of automobiles are encouraged and sometimes compelled to carry liability insurance to protect the public. Giving due consideration to the two-fold purpose of all automobile liability insurance - protection of both the insured and the public - it does not appear reasonable to allow the insured to escape liability to an injured member of the public, merely because the insured, through ignorance, indifference, or willfulness has filed to comply with the provisions of the policy unless such non-compliance has <u>materially harmed the insured</u>." (Emphasis supplied)

There was no showing by the Appellee-Garnishee that they were "materially harmed" by any lack of notice. The reason for this was the granting of the directed verdict by the Trial Court at the close of the Plaintiff's case. In fact, there was no showing that they did not receive notice in September, 1957, or November, 1957, other than the self-serving statements of their counsel and the letter from the insurance company.

II.

The Ownership of the Automobile Insured by Garnishee Was a Definite Question of Fact for the Jury To Determine

Appellee insurance company can find no comfort in the case of *Boyle v. National Cas. Co.*, 84 A.2d 614 (1961), wherein the Court set forth the obligation to defend by saying, at page 615:

> "The obligation of the insurance company to defend an action against an insured, as distinguished from its obligation to pay a judgment in that action, by the overwhelming weight of authority, is to be determined by the allegations of the Complaint. . . . If the allegations of the Complaint state a cause of action within the coverage of the policy, the insurance company must defend . . . In case of doubt, such doubt ought to be resolved in the insured's favor."

In the *Boyle* case, supra, the policy specifically excluded any injury caused by the direct assault of the insured against another. The allegations in the Complaint were to this effect, and the Court properly held that the insurance company was not liable.

However, in the case presently before this Court, it would not seem to matter whether the Plaintiff was a joint owner or not, at least in determining whether to defend against the Plaintiff's Complaint. The rea-

son for this is that the policy in question would not have barred actions by a joint owner. The exclusions to coverage of the policy are set out in the policy (J.A. 62). Joint owners are not excluded from the policy. Therefore, when the Complaint set out a cause of action in negligence, the Garnishee was under a strict duty to defend the case then filed.

Commenting further on the "facts" set out by the Appellee in his counter statement of the case, it would appear as though the policy speaks for itself and carries more weight than self-serving declarations. Listed in the "Undisputed Facts" are the statements that Osborne "warranted" the original automobile to be owned by her (A.A. 1a); and that Osborne represented to Appellee that she was the sole owner of the 1957 Chevrolet involved in the automobile accident (A.A. 2a). However, the insurance policy itself nowhere makes any mention of any warranties to the effect that Osborne was the sole owner of either automobile. The fact that the attorney for the Garnishee and the original attorney for the Plaintiff entered into a stipulation with reference to these matters does not bind present counsel nor overrule the policy itself. Garnishee again places great weight on the *Boyle* case, supra, but the Complaint itself very definitely indicates that the matter upon which suit was filed was covered under the policy. There is no exclusion as to joint ownership. (J.A. 1)

Garnishee points out that no cases have been cited where a person was trying to prove non-ownership when his name was on a title. Neither has Garnishee pointed out a similar situation which was denied, nor a situation where two parties sign a contract and both are held as joint owners. The deposition of J. A. Crowell points out that Doris V. Osborne only came to purchase the vehicle from Nalley Chevrolet (see page 10 of said deposition). The service "new car get ready" order was made out to Doris Osborne (see page 16 of said deposition). Furthermore, on page 17, Mr. Crowell states the following, under oath:

> ". . . Well, the only explanation I could give for that at the time Doris Osborne came in to purchase the vehicle, she was not able to finance it in her own name and required another signature and therefore according to all indications here, she did go and get another signature to substantiate the loan."

Furthermore, Mr. Crowell stated that the papers supposedly signed by Edythe Waters, the Plaintiff herein, were signed, "Edythe" and "Edith" in different places and apparently in two different handwritings. (See page 23 of said deposition.)

With reverse English, Garnishee attempts to use a rule and case law which was meant for the benefit of a plaintiff, for its benefit. No one will deny that a failure to file a responsive pleading admits the truth of allegations made in a Complaint, except for the amount of damages claimed. See Rule 8 (d) of the Federal Rules of Civil Procedure and *Anderson v. Gallman*, 99 A.2d 560 (1953). The fact of the matter is that the Garnishee admits the happening of the accident as well as the injuries sustained thereby. Aside from this, the Plaintiff should not be held to the legal effect, if any, of signing the Complaint at the request of her former attorney. This proposition appears to be borne by the *Churchman, et al v. Ingram, et al*, 56 So. 2d 297 (1952), wherein a deposition under oath regarding ownership was not held to preclude the parties from making different statements at the actual trial.

The Plaintiff does not contend that Missouri law should be used to determine title to a Georgia automobile, as such. It is merely the intention of the Plaintiff that the determination of ownership was one for the Jury rather than the Court.

> "The Trial Court on a Motion for a Directed Verdict must view the evidence from the standpoint most favorable to the adverse party." *Baltimore & Ohio R.R. Co. v. Rostom*, 177 F.2d 53 (D.C. Cir. 1949).

See also *Galt v. Phoenix Indemnity Co., Inc.*, 120 F.2d 723 (D.C. 1941), where the Court reversed a directed verdict granted to the Garnishee at the end of the Plaintiff's case.

With reference to the return of premiums, Garnishee brings forth the point that the Defendant's policy of insurance was "cancelled." However, even though the Defendant uses the word "cancelled," (J.A. 41-42), nevertheless, the policy was not cancelled, but merely not renewed. The Plaintiff is merely trying to bring out the fact that the Garnishee cannot state at one point that the policy was void because of a misrepresentation of ownership and still continue to have the policy in force under the same circumstances. It was brought out at the trial court that current payments on the policy were continuously made. (J.A. 43)

The Court's attention is directed to the recent case of *Bush v. Johnson*, District of Columbia Court of Appeals, Case No. 3770, decided January 19, 1966, __A.2d __, where that Court set forth the following at page 3 of the advance sheet:

> "Imperial (the insurer) seeks to sustain the judgment in its favor on the grounds that a false statement in an application for insurance bars recovery if it materially affects the acceptance of the risk, and argues that Bush's (the insured) failue to disclose that the car was registered in his sister's name was such a misrepresentation. However, if there was a written application, Imperial failed to introduce it in evidence. The only evidence on the point is the testimony of Bush that he was never asked any questions regarding title registration and that he answered all questions freely and truthfully. On this record it cannot be said that Bush made any material misrepresentation that would void the policy." (Identifications supplied.)

When directing a verdict in this case, the Court had received no evidence showing that the insured had given any false statements, writ-

ten or oral. The only documentary evidence in the case, the insurance policy (JA 61-67), shows no such false statement and, as in the *Bush* case, no written application was introduced in evidence or even produced.

III.

The Evidence Shows That the Defendant Cooperated Fully With the Garnishee, and This Could Not Be a Ground To Affirm the Trial Court's Decision

Garnishee reaches a conclusion of law that the Defendant collaborated with the Plaintiff. Therefore, the Garnishee feels that there was a lack of cooperation. In view of the facts, it is impossible to see how the Defendant failed to cooperate with the Garnishee. The Garnishee feels that the Defendant did not cooperate because she and the Plaintiff were close friends! Further, the Garnishee would like the Court to believe that there is no cooperation because the Defendant did not go far enough in defending the suit filed against her. A brief look at the facts shows the following:

1. That the Defendant gave a written statement to the Garnishee setting out exactly what the Garnishee wanted.

2. The Defendant forwarded the suit papers directly to the agent of the Garnishee immediately upon receiving the same.

3. The Defendant attempted to have counsel employed to represent her, even in view of the breach of contract on behalf of the Garnishee to defend the Defendant in personal injury suits.

CONCLUSION

Based upon the authorities and argument presented in the Brief for Appellant, and the further authorities and argument presented in this Reply Brief, it is again respectfully submitted that the Court below erred in granting the Garnishee's Motion for a Directed Verdict at the close of the Plaintiff's case; and that the decision of the District Court should be reversed and the case remanded with instruction to grant a new trial.

Respectfully submitted,

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Attorney for Appellant

BRIEF FOR APPELLEE AND APPELLEE'S APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,715

EDYTHE F. WATERS, *Appellant*

v.

AMERICAN AUTOMOBILE INSURANCE COMPANY,
Garnishee-Appellee

Appeal From the United States District Court for the District of Columbia

---

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APPELLEE'S STATEMENT OF QUESTIONS PRESENTED

The questions presented by Appellant are correct, but in the opinion of Appellee the main question presented is:

1. Should this Court decide the case only on the issues raised at trial, or may Appellant introduce new theories on appeal?

INDEX

TABLE OF CASES

TABLE OF BOOKS AND RULES

* Cases or authorities chiefly relied upon are market with asterisks.

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STATUTES, TREATIES, REGULATIONS OR RULES INVOLVED

FEDERAL RULES OF CIVIL PROCEDURE, Rule 8 (d):

> "Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided."

FEDERAL RULES OF CIVIL PROCEDURE, Rule 11:

> ". . . The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay . . ."

PRETRIAL INSTRUCTIONS TO COUNSEL, Part F, Appendix to the Rules of the United States District Court for the District of Columbia:

> "F. TRIAL BRIEF:
>
> In any case involving foreign law or complicated legal issues the parties shall, and in all other cases the parties may, furnish a brief statement of the points of law involved, giving the text of and citation to any relevant foreign statute, and citations of the authorities in support of each point upon which the party intends to rely at trial."

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,715

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v.

AMERICAN AUTOMOBILE INSURANCE COMPANY,
Garnishee-Appellee

Appeal From the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This Court should have the opportunity to decide the case upon all the facts presented to the trial court. Appellee, therefore, feels that a Counterstatement of the Case would be appropriate. Through inadvertence the Pretrial Proceedings was omitted from the Joint Appendix. It has

been annexed to Appellee's Brief as Appellee's Appendix, and will be designated as "A. A."

The "Undisputed Facts" contained in the Pretrial Proceedings (A. A. 1a) show that on or about June 3, 1957, Appellee (garnishee below) issued an automobile liability insurance policy to Doris V. Osborne (defendant below) covering a 1952 Chevrolet, which Doris V. Osborne warranted was owned by her. The policy included bodily injury, property damage, comprehensive and collision coverage. On or about July 9, 1957, at the request of Doris V. Osborne, Appellee canceled the coverage on the 1952 Chevrolet and a "substitution of automobile" form was made effective, which substituted a 1957 Chevrolet for the one previously insured and the comprehensive and collision coverages were deleted from the policy. At the time of the substitution, the insured, Miss Osborne, represented to Appellee that she was the sole owner of the 1957 Chevrolet, which was purchased from Nalley Chevrolet, Inc., Atlanta, Georgia on July 9, 1957.

The bill of sale from Nalley Chevrolet, Inc. named Doris V. Osborne and Edith Waters as purchasers of a 1957 Chevrolet and that the Customer's Statement and a Purchaser's Statement blank were signed by "Edythe Waters." [Miss Waters is Appellant and it should be noted that she used the first names of "Edythe" (J. A. 1), "Edith" (J. A. 12) and "Judy" (J. A. 17).]

On September 7, 1957, the 1957 Chevrolet was involved in an accident in South Carolina and both Miss Osborne and Miss Waters were in the car at the time of the accident. On April 21, 1958, Gilbert Rosenthal, an attorney in Baltimore, Maryland, wrote to the agent of Appellee in St. Louis, Missouri, advising that his office had been retained to represent Miss Waters in a personal injury claim arising from the accident.

Subsequently, Appellee disclaimed any liability under the policy for any claims arising from that accident and on

August 15, 1958, Appellant sued Miss Osborne for personal injuries. No Answer was filed, default was entered on April 16, 1959, and an inquisition was held on July 3, 1959, which resulted in the entry of judgment in the amount of $100,000 against Miss Osborne. Attachment was served on Appellee, who answered that it had no assets or credits in its possession. Traverse was filed and the issues were set for trial. All of the above was agreed to in the Pre-Trial Proceedings.

At trial, the insurance policy was introduced into evidence as Plaintiff's Exhibit #1. (J. A. 43) It contains the following pertinent provisions:

> CONDITIONS:
> "3. Notice. In the event of an accident, occurrence or loss, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable. In the event of theft the insured shall also promptly notify the police. If claim is made or suit is brought against the insured, he shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.
>
> * * * * *
>
> "6. Assistance and Cooperation of the Insured—Parts I and III. The insured shall cooperate with the Company and, upon the Company's request, attend hearings and trials and assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.
>
> "7. Action Against Company—Part I. No action shall lie against the Company unless, as a condition

> precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company." (J. A. 63)

When the 1957 Chevrolet was purchased and at the time of the accident both Miss Waters and Miss Osborne were enlisted personnel in the WAC stationed together at Ft. McPherson, Georgia. (J. A. 12) Miss Waters was an E-4, equivalent to a Corporal and Miss Osborne was either a Private or a Private First Class. (J. A. 13)

The sworn Complaint filed when Miss Waters sued Miss Osborne alleged that, "the automobile herein concerned was jointly owned by the plaintiff and defendant." (J. A. 1) At the trial both tried to deny joint ownership, but Appellant, Miss Waters, admitted signing "some papers" at the automobile agency. (J. A. 13) She identified both her signature and Miss Osborne's signature as "buyers' signature" on a paper bearing the letterhead of Nalley Chevrolet, Atlanta, Georgia, marked "Garnishees' pretrial exhibit No. 2". (J. A. 24) She also identified both signatures on "Purchasers' statement", Exhibits 4 and 5. (J. A. 25)

Miss Osborne, appearing as a witness for Appellant, denied that Miss Waters had any interest in the 1957 Chevrolet. (J. A. 43) On cross examination, however, she admitted that both she and Appellant had signed a paper for Nalley Chevrolet, marked "Garnishees' Exhibit 2" by the Pretrial Examiner, on the reverse of which she had listed "Edythe Waters" as a single person under the age of 25 who would operate the car, and that Appellant had signed a similar page listing "Doris Osborne, friend" as a single person under the age of 25 who would operate the car. (J. A. 50) She also admitted that the car was delivered to her and sold to Doris V. Osborne and Edythe

Waters. (J. A. 49) She informed her insurance broker, Mr. Rebholtz, to cancel the insurance on the 1952 Chevrolet and reissue it on the new car, but did not tell him Miss Waters was a joint owner of that car. (J. A. 51)

After the accident, Appellant was first taken to a military hospital at Fort Jackson, South Carolina, and was later transferred to Fort Bragg, North Carolina. Miss Osborne visited her at both hospitals. (J. A. 18) Later she was transferred to Walter Reed Hospital in Washington. (J. A. 18)

Miss Waters and Miss Osborne had known each other about a year and a half before the accident. Miss Osborne was under investigation, as was everyone in the WAC detachment at Ft. McPherson, and Miss Waters had been questioned about their relationship. (J. A. 17) One of Appellant's attorneys, Gilbert Rosenthal, originally represented Miss Osborne before the Board of Inquiry in connection with her discharge from the WAC's. (J. A. 32-33) The Board of Inquiry had nothing to do with the accident. (J. A. 33) He testified Miss Osborne never even told him she had been in an accident until he met Appellant at Walter Reed Hospital. (J. A. 33) Miss Osborne, on the other hand, testified that while Mr. Rosenthal was representing her before the Board of Inquiry, she told him about the accident and the fact that she had been in the hospital. (J. A. 48) She didn't know if she gave him a written statement or told him how the accident happened. (J. A. 48) Mr. Rosenthal testified he wasn't sure whether Miss Osborne or Miss Waters told him how the accident happened. (J. A. 33)

Miss Osborne was from St. Louis, Missouri, and worked there before she entered the WAC. (Tr. 117) She received a General Discharge from the WAC in December, 1957, and about a week later came to Washington to live. (J. A. 47)

Miss Osborne testified that she didn't come to Washington just because she wanted to be with Miss Waters (J. A. 47), but she refused to deny, under oath, that she told Mr. Page Digman, a representative of Appellee, on May 5, 1958, that Miss Waters was her wife. She said she didn't remember making that statement. (J. A. 47-48)

Miss Osborne first took an apartment on Sixteenth Street and Appellee used to visit her on weekends when she was away from Walter Reed on a pass. (J. A. 18-19) Mr. Rosenthal continued to represent Miss Osborne, who was trying to get back in the WAC. (J. A. 47) Miss Osborne took him to Walter Reed and introduced him to Appellant as her attorney. (J. A. 48)

Both Appellant and Mr. Rosenthal testified that Appellant had another lawyer, but neither could remember his name. (J. A. 15) In fact, Mr. Rosenthal didn't even think he knew who he was. He never checked with this lawyer to see if he had any papers relating to the case or to see if he was entitled to any fee. (J. A. 35-36)

After Miss Osborne introduced her lawyer to Appellant, Miss Waters retained him to sue Miss Osborne. She was unable to remember whether she retained him that day or not. (J. A. 20) Mr. Rosenthal took the case on a one-third contingency fee basis and referred the case to Mr. Kiley (the attorney who handled the inquisition and tried the garnishment action) on a 50-50 arrangement. (J. A. 31-32) When he testified he stated that his file was mixed in with Mr. Kiley's file and he didn't know when he was retained or if he had any agreement signed. (J. A. 31) He also didn't know if he ever wrote a letter to Miss Osborne putting her on notice that he was making a claim against her. (J. A. 32)

Mr. Rosenthal did state that he wrote to Appellee on April 21, 1958 notifying it that he was representing Miss Waters in a claim against Miss Osborne, who was insured

under Policy No. A-1686119. He couldn't remember who told him the policy number or if Miss Osborne had given him her policy. (J. A. 34-35) Miss Osborne's policy was in the possession of Appellant's attorney at pretrial and was marked by the Examiner as Pretrial Exhibit No. 1. (A. A. 7a) It was taken from his file and introduced into evidence at trial as Plaintiff's Exhibit 1. (J. A. 43)

Miss Osborne testified that when Mr. Rosenthal decided to sue her, she never told him he couldn't sue her because he was her lawyer, and that he never told her ethics prohibited him from suing her because he also represented her. (J. A. 49)

After Mr. Rosenthal's letter of April 21, 1958 was written, a representative of Appellee, Mr. Page Digman, interviewed Miss Osborne and took a signed statement from her. (J. A. 51) This statement was used to refresh her recollection and she testified that she told Mr. Digman she had not reported the accident to her insurance company, Appellee herein, because she and Miss Waters owned the car jointly and because she thought the military was going to report it . (J. A. 51-52)

Four days later, on May 9, 1958, Appellee mailed a Registered letter to Miss Osborne informing her it was disclaiming any liability because the car was jointly owned without its knowledge and because she had not notified it of the accident within a reasonable time as required by the policy. (J. A. 53) She identified her signature on the Registered Receipt (J. A. 52), but didn't remember reading the letter, stating that she commonly received registered letters that she didn't read. (J. A. 53) She stated that she might have opened it and glanced over it, but couldn't remember reading it.

The Complaint was sworn to by Appellant on July 31, 1958 before a Notary Public in Maryland (J. A. 1-2), and was filed in court on August 15, 1958. Appellant's address

was listed as Walter Reed Army Medical Center and defendant's address was listed as 1708 – 16th Street, N. W. (J. A. 1) Before the Marshal could effect service, Appellant was discharged from the WAC and went to live with Miss Osborne on Downing Street. (J. A. 20) The Marshal served Miss Osborne at Apartment 1053A, 1400 Downing Street, N. E., on December 12, 1958, at 11:53 a.m. Appellant was present when the Marshal made service, but doesn't remember if he handed the papers to her or to Miss Osborne. (J. A. 21)

Miss Osborne sent the suit papers to Appellee, who promptly returned them to her by Registered Mail. The Registered Receipt for that letter was actually signed on January 2, 1959 by Appellant, "Judy Waters". (J. A. 26-27 and J. A. 54) Appellant gave the letter to Miss Osborne (J. A. 54), but neither could remember what conversation they had about the return of the suit papers. (J. A. 27, 55)

On the day the case was set for inquisition, both were living together, but couldn't remember any conversation about the suit. (J. A. 27, 56) Appellant doesn't recall if Miss Osborne dropped her off at court or if she took a cab. (J. A. 27) Miss Osborne never asked Appellant not to sue her or not to take judgment against her (J. A. 56), nor did she contest the case. (J. A. 56) Miss Osborne testified Appellant never told her the amount of the judgment. (J. A. 56) Appellant testified she didn't remember telling her the size of the judgment, or if they made a joke of it, or whether she told her or not. (J. A. 28-29) They lived together for a year (J. A. 29), and remained friends up through the trial of the garnishment action. (J. A. 29) Miss Osborne lived in California for three years before March, 1964, but after her return to the Washington area she and Appellant visited regularly on weekends. (J. A. 46-47)

Appellant made no effort to collect the judgment from Miss Osborne; never attached her salary (J. A. 29, 56); never asked her to pay a dime (J. A. 56, 57); never reported the unpaid judgment to the Department of Motor Vehicles (J. A. 29); and indeed, had never authorized her attorney to make any attempts at collecting the judgment from her friend. (J. A. 29)

At the conclusion of Appellant's case, the trial judge directed a verdict in favor of the Garnishee (Appellee) on two grounds: (1) Misrepresentation as to ownership of the automobile insured; and (2) Failure by the insured to notify Garnishee as soon as practicable. The trial judge stated he deemed much merit in the third ground presented, i.e., lack of cooperation on the part of the insured, but he did not utilize that as one of the bases for the directed verdict. (J. A. 60)

This Appeal followed the direction of the verdict, after Motion For New Trial was denied. (J. A. 11)

SUMMARY OF ARGUMENT

1. Appellee's attorney has been required to keep one strabismic eye on the record and another on Appellant's Brief because the case being presented on appeal does not necessarily represent the case that was tried. This Court should consider only the issues raised below. The law throughout the United States, including Missouri and the District of Columbia, is that if an insurance policy requires reasonable notice of the accident and injuries as a "condition precedent" to recovery, then the insured, or one claiming under him, has the burden of proof.

2. In this case the insured admitted not giving notice until almost eight months after the accident, after the injured party had already retained an attorney. Insured, therefore, breached the policy provision and thus there can be no recovery.

3. Evidence of joint ownership was so overwhelming (including the Stipulations at Pretrial and the sworn Complaint) that the trial court was justified in ruling the insured had made a false material representation to the company. This Court should not consider the new theory that representations are not warranties, because it was never raised below. Georgia was a "non-title state", so Missouri law cannot be used to determine ownership. The question of retention or return of premiums was not raised at trial, so should not be considered here.

4. This Court should affirm on either of the two bases relied upon by the trial judge. Additionally, the facts regarding the close collaboration between Appellant and Appellee's insured is sufficient for this Court to rule that the insured breached the "cooperation" clause of the policy.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN DIRECTING A VERDICT FOR GARNISHEE, BECAUSE PLAINTIFF'S EVIDENCE SHOWED THAT INSURED FAILED TO PERFORM A CONDITION PRECEDENT TO RECOVERY BY GIVING NOTICE OF THE ACCIDENT, WHETHER THE CASE BE DECIDED BY THE LAW OF MISSOURI, THE DISTRICT OF COLUMBIA, OR ELSEWHERE

The Courts of America, perhaps reflecting the collective consciences of their communities, have pounced upon insurance companies, dragging them off for financial sacrifices amid the huzzahs of the multitudes, in a manner not unlike the barbaric custom of scourging a tribal scapegoat to atone for the sins of his people; thereby unloading upon this monetary martyr the esurient guilt of the populace, and expiating their avariciousness by its immolation. This is not a modern philosophy, but has existed for years. As William Schwenck Gilbert told us in Stanza 1 of Etiquette, part of "The Bab Ballads" written in the middle of the nineteenth century:

"And down in fathoms many went the captain and the crew;
Down went the owners—greedy men when hope of gain allured:
Oh, dry the starting tear, for they were heavly insured."

This attitude might have some efficacy when applied to life insurance companies, whose rates are predicated upon life expectancy when the policy is written, but whose payments are made upon an increased life expectancy when the policy is terminated by death. However, casualty insurance rates are based upon a mathematical formula called the *laws of probability*. The contract is carefully written to cover only certain predesignated risks, and computers apply the *laws of probability* to those risks in order to determine the rate. Whenever the human factor disturbs the *laws of probability* and adds risks not previously included in the policy, then increased payments must be made.

One isolated case would not be too disruptive, but one isolated case must be multiplied by other "isolated cases" spread throughout the country. When undesignated losses are held to be covered by the policy, the rate system is disruped and unscheduled payments must be made.

A casualty insurance company is not a financial colossus run for the private economic advantage of its owners. Indeed, insurance companies have been held to be trustees of their policyholders' money. Judge Cardozo's oft quoted statement of 1928 in *Meinhard* v. *Salmon*, 249 N. Y. 458, 464, that, "A trustee is held to something stricter than the morals of the market place," is uniquely true of insurance companies, since this business is the most regulated in America. All States and the District of Columbia regulate each casualty company and determine the rates each can charge. Every state must allow a fair profit, so it can

truly be said that this year's payments determine next year's premiums.

Judicial egalitarianism has not deemed it appropriate to include insurance companies among its beneficiaries. This jurisdiction has held that insurance policies are to be strictly construed against the company. *Love* v. *American Casualty Co. of Reading, Pa.*, 113 U. S. App. D. C. 195, 306 F. 2d 802 (1962) and *Smith* v. *Indemnity Insurance Company of North America*, 115 U. S. App. D. C. 295, 318 F. 2d 266 (1963). Strict construction, however, should not mean strained construction; or as was pointed out by the 7th Circuit in *Hawkeye-Security Ins. Co.* v. *Myers*, 210 F. 2d 890, 891:

> "It is true that conditions are inserted in insurance policies by the insurer for its protection and should be construed, where such construction is permissible against the insurer. (Case cited). It is equally true, however, that the insurance policy is the contract between the parties and that the provisions of that contract, which are clear and unambiguous and which are neither illegal by statute nor by reason of their being against public policy, should be enforced by the courts. The courts may not rewrite for the parties insurance contracts which are clear and unambiguous."

In *American Insurance Company of City of Newark* v. *Keane*, 98 U. S. App. D. C. 152, 233 F. 2d 354 (1956) this Court ruled, "We are not empowered to make a new contract for the parties." In the case at bar, this Court is called upon to construe a contract of insurance that required the insured to give notice of an accident and injuries to the company within a reasonable time as a "condition precedent" to recovery against the company.

It is imperative from the outset that we all understand and recognize what is meant by "condition precedent," because the entire interpretation of the contract of insurance depends upon these words.

Ballentine's Law Dictionary, 1948 Ed., The Lawyers Co-Operative Publishing Co., defines "condition precedent" on page 258 as, "A condition which must happen before either party to a contract becomes bound by it."

Black's Law Dictionary, 4th Ed. (1951), West Publishing Co., page 366, defines the term as follows:

> "A 'condition precedent' is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act after the terms of the contract have been agreed on, before the contract shall be binding on the parties."

With specific reference to "conditions precedent" in insurance contracts, the Court is referred to page 238 of *Essentials of Insurance Law,* 1957, McGraw-Hill Book Company, Inc., by Edwin W. Patterson, Cardozo Professor of Jurisprudence, Columbia University and former Deputy Superintendent of Insurance of the State of New York. He says:

> "A condition gives the promisor a legal justification for refusing to perform his promise. A promise gives a sword to the promisee; a condition gives a shield to the promisor. A condition gives the promisor a defense, either negative or affirmative, to an action at law brought by the promisee for nonperformance of the promise. Some conditions (called conditions precedent) confer a negative defense, since the promisee has the burden of proving that the condition has been fulfilled. Other conditions (conditions subsequent) give the promisor an affirmative defense, since the latter has the burden of proving that the condition has not been fulfilled. This distinction is of practical importance in litigation. Aside from these procedural effects, the distinction between 'precedent' and 'subsequent' conditions is of little practical value."

With this thought in mind, and not conceding that this Court should determine the present case on Missouri Law

(a determination not asked of the trial court), we must now look at the history of decisions by courts in Missouri and elsewhere. For clarity and better understanding, the cases will be divided into six sections: St. Louis Court of Appeals; Kansas City Court of Appeals; Federal Cases Involving Missouri Law; Missouri Supreme Court; District of Columbia Law; and The Law Elsewhere.

At first blush it would appear that the courts of Missouri seem to feed upon their own decisions in a sort of cannibalistic fetishism. There might be justification for this conjecture unless one understands the characteristic phenomenon of that State's judicial system. It is vital to the determination of Missouri Law to realize that not every opinion appearing in the Southwestern Reports is a decision of the highest appellate court of Missouri.

The appellate judiciary of Missouri is composed of a Supreme Court, with a Chief Justice, and two Divisions of equal dignity. Each Division has a Presiding Judge, Associate Judges and Commissioners. There are three Courts of Appeals under the Supreme Court—St. Louis, Kansas City and Springfield, each with a Presiding Judge and Associate Judges. Additionally, the St. Louis and Kansas City Courts of Appeals have Commissioners. (See 393 S. W. 2d v). Each Court of Appeals has final appellate jurisdiction in its district of all cases from circuit courts and inferior courts of record, except in those cases in which appeal lies direct to the Supreme Court, e.g., cases involving more than $15,000., construction of state or federal constitutions, federal statutes or treaties, state revenue laws, federal laws, title to real property or a state office, a felony, or cases in which a subdivision of the state or a public officer is a party. IV *Martindale-Hubbell Law Directory* (1966), 3443. This explains how the Courts of Appeals can and do follow different interpretations of the law within the same state. It should also be mentioned that the Commissioners of the Spreme Court and of the

Courts of Appeals, while not designated as Judges, do write opinions.

After this preparatory orientation we can now analyze the various decisions and obtain definite conclusions.

Pollock and Maitland tell us in the opening sentence of *The History of English Law,* "Such is the unity of all history that any one who endeavours to tell a piece of it must feel that his first sentence tears a seamless web."

A. St. Louis Court of Appeals

Appellant tears this "seamless web" and starts her presentation of the issue with a 1934 decision of the St. Louis Court of Appeals in the case of *Walker, to the Use of Foristel* v. *American Automobile Ins. Co.,* 70 S.W. 2d. 82. Historically, then, let us begin with that case.

It must be noted immediately that the policy under consideration by that court differs from the one in the case at bar, in that it does not contain those important words, "as a condition precedent thereto." The St. Louis Court of Appeals quotes on page 85 from the case of *Gratz* v. *Highland Scenic Railway Co.,* 165 Mo. 211, 65 S. W. 223, 225, by saying, "Where the terms of a contract are left open to construction, and the question is, do they amount to a condition subsequent or to a covenant, the inclination should be to hold it a covenant. A condition that works a forfeiture is not favored, and the law will not presume that it was intended, if the terms used can as reasonably be construed to mean a covenant."

The opinion is better understood if one reads the entire second paragraph on page 88, only a portion of which is quoted on page 15 of Appellant's Brief. It is set forth in its entirety below, with the previously omitted sentences italicized:

> *"Appellant urges that it is not relying upon a forfeiture, but is relying simply upon a condition prece-*

dent, to defeat, not to forfeit, the right of recovery on its policy. It would serve no useful purpose to enter upon a discussion of the refinements distinguishing conditions precedent and conditions subsequent. Obviously the notice provision in this policy is a provision looking to the avoidance of liability, and it suffices to say that the courts of this state, and elsewhere with a few exceptions, have refused to regard a provision such as this as a condition that defeats recovery or avoids liability for failure to give the notice within the time stipulated, in the absence of any showing of prejudice to the insurer thereby, unless the policy expressly so declares in some sort of appropriate and unambiguous language. *This is made manifest by the cases cited. To this end we have quoted from a number of cases in extenso.*"

The court had quoted from *James* v. *United States Casualty Co.*, 113 Mo. App. 622, 88 S. W. 125 that, "There should be a clear and an express statement for forfeiture before the courts will enforce it." It recognized that a "condition precedent" requirement would conform to the requirements of a declaration "in some sort of appropriate and unambiguous language," by stating, in the first paragraph on page 87:

> "In Hope Spoke Company v. Maryland Casualty Co., 102 Ark. 1, 143 S. W. 85, 88, 38 L. R. A. (N. S.) 62, Ann. Cas. 1914A, 268, plaintiff sued on a liability policy. The suit was defended for failure of the insured to give immediate notice of the accident. In rejecting this defense, the court, after reviewing the authorities, said: 'In the absence of an express stipulation declaring this requirement to be of the essence of the contract and, therefore, *a condition precedent to the right of recovery*, we do not think that it is correct to say that such a requirement is of the essence of the contract unless it is shown to materially affect the rights of the parties in the given case'." (Emphasis supplied.)

The insurance company attempted to have the court construe the notice provision as a condition precedent, but this was brushed aside with the following statement:

> "Appellant, in argument, stresses the fact that the policy here, in express terms, provides that the insurance is subject to the agreement that the insured shall give immediate notice of any accident, and says that this provision makes the agreement to give notice a condition precedent entitling the insured to arbitrarily defeat the insurance for breach of the agreement. We cannot accept this view. The provision that the insurance is subject to the agreement to give notice falls far short of giving a right to defeat the insurance for failure to perform the agreement within the time specified for its performance, without any showng of prejudice to the insurer thereby. The provision means that the insurance is subject to the agreement construed as it ought to be construed, that is, with a proper regard for the consequences of its breach. See cases supra; Dezell v. Fidelity & Casualty Co., Gratz v. Highland Scenic Railway Co., James v. United States Casualty Co., and Malo v. Niagara Fire Ins. Co."

Then the judges chided the insurance company for attempting to lay such stress on the importance of early notice, by stating:

> "It may not be impertinent to observe, in passing, that the lively concern the appellant now manifests about the importance to it of having immediate notice of the accident is manifested by it, respecting the importance of such notice, when it wrote the policy and sold it to the insured. If the appellant, when it wrote the policy and sold it to the insured, regarded immediate notice of the accident of such importance to it that the failure of the insured to give such immediate notice should operate to release it from liability, it would have been an easy matter for it to have plainly provided in the policy that such failure should have that effect. Not having so provided, appellant ought not be permitted, when called upon by the assured

> for the protection he purchased and paid for, to supply the omission by construction, or an exegesis of learned counsel on the fine points of the law relating to conditions precedent and subsequent."

Justice Holmes told us that, "The life of the law has not been logic: it has been experience." Having suffered this experience at the hands of the court, the insurance industry, which also does not operate in a vacuum, seized the gauntlet thrown down by this and other courts, since this was not an isolated decision, and changed the wording of its policies to make full compliance with policy provisions a "condition precedent" to recovery.

By 1959, the St. Louis Court of Appeals clearly recognized the importance of the words "condition precedent" when it decided the case of *Northwestern Mutual Insurance Co.* v. *Independence Mutual Insurance Co.*, 319 S. W. 2d 898. Condition 6 of the policy under consideration there is identical with the wording of the policy in the case at bar, namely, "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of the policy, . . ." The condition is set forth on page 901, and on the following page the court said, "Conditions 2, 6 and 16 of the policy are conditions precedent. They are valid, binding and enforceable provisions." It then explained the importance of this contractual agreement by stating:

> "Where the condition is expressly made a condition precedent, the insurer is relieved of liability whether or not the insurer has been injured or prejudiced by the breach of the condition. Malloy v. Head, 90 N. H. 58, 4 A 2d 875, 123 A. L. R. 941; Deer Trail Consol. Min. Co. v. Maryland Casualty Co., 36 Wash. 46, 78 P. 135, 67 L. R. A. 275; 76 A. L. R. 187, 189, 203. Annotation 123 A.L.R. 981, 984; Annotation 18 A. L. R. 2d 479; 8 Appleman, Insurance Law and Practice, § 4732, p. 100. The parties to the contract having voluntarily bound themselves to perform according to

> the strict letter of the condition precedent will be held to their obligation."

The court then pointed out that the burden of proving policy compliance was on the insured, or one standing in the insured's shoes, by stating, "The burden of proof upon the question of compliance with the condition, ordinarily imposed upon the insured, (cases cited) rests in this case on Northwestern, the subrogee of the unnamed beneficiary of the policy, which stands in the shoes of the insured." This was based upon the prior decision of *Donlon* v. *American Motorists Ins. Co.*, 147 S. W. 2d 176, Motion for Rehearing overruled, 149 S. W. 2d 378, which held that a garnishee stands in no more favorable position to assert the liability of the insurance company then would a policyholder if she had paid the judgment or brought an action against the company for the amount paid. The *Donlon Case* involved a policy making notice a "condition precedent" to liability, or as the court said:

> "In clear and unambiguous words the policy contract provided that if claim is made or suit is brought, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative; and that as a condition precedent to any action against the Company the insured should comply with this as well as all of the conditions of the policy contract."

B. Kansas City Court of Appeals

Over in the Kansas City Court of Appeals, the judges had been reading "condition precedents" into policies as long ago as 1913 in the case of *National Paper Box Co.* v. *Aetna Life Ins. Co.*, 170 Mo. App. 361, 156 S. W. 740. The policy had no forfeiture provision and did not have the magic words, but the court said:

> "But manifestly this rule should not be applied to a policy such as that under consideration, for the reason that the provision for notice of the accident

is in the nature of a condition precedent, is a promissory warranty of the very essence of the contract."

The same result was obtained by the Kansas City Court of Appeals in *United States Fidelity & Guaranty Co.* v. *W. P. Carmichael Co.*, 195 Mo. App. 93, 190 S. W. 648, decided in 1916. By 1937, a suit to reform an insurance policy to include an additional insured whose name had been erroneously omitted from the policy by the Insurance Company reached the Kansas City Court of Appeals. This was *St. Paul & Kansas City Short Line R. Co.* v. *United States Fidelity & Guaranty Co.*, 231 Mo. App. 613, 105 S. W. 2d 14. The policy under consideration was an old one similar to that in the 1934 Walker case and thus had no provision regarding condition precedent, but merely provided, as set forth on page 18: "Upon the occurrence of an accident the assured shall give, as soon as reasonably possible, notice thereof with the fullest information obtainable to the Company at its Home Office or to a duly authorized agent of the Company." The paragraph beginning at the bottom of page 23 and continuing over on page 24 shows that the insurance company contended the provision was in the nature of a "condition precedent," but the court declined to read the magic words into the policy. The court held also that actual prejudice must be proven, since it would not be presumed. To that extent, the Court overruled the National Paper Box and W. P. Carmichael Cases. *Thus Missouri had two equipollent Courts of Appeals in conflict with each other.*

This makes it difficult to apply the "law of the State" as enunciated in *Erie Railroad Co.* v. *Thompkins*, 58 S. Ct. 817, 304 U.S. 64, 82 L. Ed. 1188 (1938), since there are two different laws of this State, depending on one's geographical location. Actually, since the policy was written in St. Louis, it would seem appropriate to follow the law set down by the St. Louis Court of Appeals if the Supreme Court of Missouri has never ruled on that exact

point. One doubts, however, if the United States Supreme Court considered such a precise refinement in the Erie Railroad Case.

C. Federal Cases Involving Missouri Law

It is hoped that the above background will help the Court understand the three Federal Cases decided on this point by the 8th Circuit Court of Appeals. Frankly, Appellee's attorney was almost hopelessly confused until he reread the state cases in geographical and chronological order.

In 1930 the 8th Circuit decided *St. Louis Architectural Iron Co.* v. *New Amsterdam Casualty Co.*, 40 F. 2d 344. There it followed the law prevailing in both the Kansas City and St. Louis Courts of Appeals at that time, by stating on page 346:

> "One contention of appellant is that the liability of the appellee under the indemnity insurance policy was not affected by the failure to give immediate written notice of the accident in accordance with condition B, because there was no provision of forfeiture in the policy for failure to give the notice. We are of the opinion, however, that such a forfeiture provision is not necessary where, as in the case at bar, the language of the contract between the parties plainly makes the giving of the notice of the accident a *condition precedent* to liability on the part of the insurance company." (Emphasis supplied)

Twenty years later, in 1950, another policy came before the 8th Circuit in the case of *Western Casualty & Surety Co.* v. *Coleman*, 186 F. 2d 40. It must be noted that the policy under consideration did not have the magic words "condition precedent" in it, but simply provided, as is set out on page 43 of the opinion, that a claim should not be valid "unless the provisions and conditions of the contract of insurance are complied with by the insured." In that case the insured's employee was driving a truck

involved in an accident and the insured believed the facts relating to permission given to a rider to be such that no claim would be made against him, so he did not report the accident until he knew a claim was going to be made. The trial judge decided that the insured was not required to give notice of the accident "until such time as facts were made known to him, as a reasonably prudent person, that a liability existed therefor, and that he might be required to respond in damages as a consequence of the happening of such event." The judge held that the insured acted with reasonable prudence in the giving of notice.

The 8th Circuit said on page 43:

> "We have repeatedly said that, in reviewing doubtful questions of local law, we would not adopt views contrary to those of the trial judge unless convinced of error, and that all this Court reasonably can be expected to do in such cases is to see that the determination of the trial court is not induced by a clear misconception or misapplication of the local law."

As pointed out above, the policy under scrutiny in that case merely required compliance with the provisions and conditions of the policy, but did not make compliance a "condition precedent." The 8th Circuit, "in reviewing doubtful questions of local law," followed the law laid down by the trial judge and said, "There should be a clear and an express statement for forfeiture before the courts will enforce it." It is interesting to note that this case was tried by a District Judge of the Western District of Missouri, which sits in Kansas City and St. Joseph, and not from the Eastern District, which sits in St. Louis and Cape Girardeau. It is not surprising that he should follow the law of the Kansas City Court of Appeals.

In 1960 when the case of *Hawkeye-Security Ins. Co.* v. *Davis*, 277 F. 2d 765, came before the 8th Circuit, it had decided two prior cases; one with a condition precedent

and one without a condition precedent. The Davis case was one for Declaratory Judgment brought to determine liability under a policy because of late notice. It had the same policy provision as the policy under consideration in the present case, and the Court said, "Thus it is apparent that the policy makes giving reasonable notice of the accident a condition precedent to insurer's liability."

The 8th Circuit refused to follow its previous decision of *St. Louis Architectural Iron Co.* v. *New Amsterdam Casualty Co.*, 40 F. 2d 344, because that case had relied upon two intermediate court decisions, *National Paper Box Co.* v. *Aetna Life Ins. Co.*, 170 Mo. App. 361, 156 S. W. 740, and *U. S. F. & G.* v. *W. P. Carmichael Co.*, 195 Mo. App. 93, 190 S. W. 648, which "were expressly overruled by the Kansas City Court of Appeals, which had decided such cases, in *St. Paul & Kansas City Short Line R. Co.* v. *United States Fidelity and Guaranty Co.*, 231 Mo. App. 613, 105 S. W. 2d 14, 25-26." The court also rejected the opinion of the St. Louis Court of Appeals in *Northwestern Mutual Ins. Co.* v. *Independence Mutual Ins. Co.*, 319 S. W. 2d 898, as being contrary to the Kansas City Court of Appeals.

The court said on page 765, "In diversity cases it is our duty to apply state laws as determined by state appellate courts. This court is not a state appellate court and has no right to determine what the state law should be." It adopted the law followed by the trial court and said, on page 770, "If the determination of the local law by the trial court is not induced by a clear misconception or misapplication of local law, we will not reverse." It is interesting once again to note that the local law was promulgated by a District Judge of the Western District, sitting in Kansas City.

The difficulty in understanding this case is that it followed the law enunciated by the trial judge and adopted a case decided by one intermediate appellate court, while rejecting a case decided by another appellate court with

equal authority. In doing so, the court failed to realize or note that the Kansas City Court of Appeals' case it followed, *St. Paul & Kansas City Short Line Ry. Co.* v. *United States Fidelity & Guaranty Co.*, 231 Mo. App. 613, 105 S. W. 2d 14, involved a policy that did *not* make giving notice a "condition precedent" to liability, although the policy in the case it was deciding did so require it. On the other hand, the St. Louis Court of Appeals' case it rejected, *Northwestern Mutual Ins. Co.* v. *Independence Mutual Ins. Co.*, 319 S. W. 2d 898, had the same policy provision as the case under consideration, making notice a "condition precedent" to recovery.

The 8th Circuit compounded its error by refusing to follow its previous decision in *St. Louis Architectural Iron Co.* v. *New Amsterdam Casualty Co.*, 40 F. 2d 344, and by electing to follow its case of *Western Casualty & Surety Co.* v. *Coleman*, 186 F. 2d 40. The former case, that was not followed, had a requirement making notice a "condition precedent" to recovery, just as the case under consideration had, while the later case did not require notice as a "condition precedent."

This then is not an eclectic decision, but is based upon a potpouri of fallacious reasoning. With due deference to the judges who decided *Hawkeye-Security Ins. Co.* v. *Davis*, 277 F. 2d 765, it must be observed that they either did not understand the historical reason for the use of the words "condition precedent", or they just blindly followed the law adopted by the trial judge.

Appellee's attorney's impression that the preceding opinion was a casuistic decision based upon imprecise reasoning, and lacking judicial acuity was vindicated when he "Shepardized" it and read the comment of the 7th Circuit about that case in *Hartford Accident & Indemnity Co.* v. *Lochmandy Buick Sales, Inc.*, 302 F. 2d 565, a case involving a question of delay in giving notice of an accident. The 7th Circuit Court of Appeals discussed and cited some seventeen different decisions on this point. In doing so,

it said on page 567, "And *Hawkeye-Security Ins. Co.* v. *Davis,* 8 Cir., 277 F. 2d 765 (1960) is admittedly not certain authority."

D. Supreme Court of Missouri

As far as can be ascertained, the Supreme Court of Missouri has never had an occasion to decide a case involving the avoidance of coverage because of failure of the insured to give reasonable notice when such is made a "condition precedent." This is not surprising when you consider that conflict between the Circuits is not sufficient to take a case before the Missouri Supreme Court. A case must meet the $15,000 jurisdictional limit before it can be appealed to the Supreme Court.

In 1964 the Supreme Court of Missouri decided the case of *Meyers* v. *Smith,* 375 S. W. 2d 9, which involved "lack of cooperation" by an insured. Judgment was for $15,000, so the case went to the Supreme Court rather than to one of the Courts of Appeals. The court held that an insured, or one standing in the insured's shoes, has the burden of proving compliance with all provisions of the policy, except "where the garnishee seeks to escape coverage solely because of an alleged breach of a policy provision requiring the insured to cooperate with the insurer." The Supreme Court of Missouri thus carefully delineated between breach of notice provisions and breach of cooperation provisions.

That was a garnishment action tried on a Stipulation of Facts. On May 15, 1955, a Ford with six teenagers in it went off the road, killing one Ruth Myers. The car was owned by Ralph Smith, father of Daryl Smith, who originally told his father's insurance company that he was the driver at the time of the accident. Later, on June 27, 1955, his parents reported that the deceased, and not their son, was driving. The son corroborated the latter version through three trials and two appeals. [The court referred to the two appeals: *Meyers* v. *Smith,* 300 S. W. 2d 474

and *Meyers* v. *Smith*, 349 S. W. 2d 412]. While Daryl and other passengers testified the deceased was driving, the plaintiff had other witnesses to whom Daryl told he was driving. The company refused to pay the judgment because Daryl "breached a condition of said contract by failing to cooperate with the garnishee" as required by Condition 16 of the policy. The court said, however, "From June 27, 1955, through the date of the last Trial between the plaintiffs and defendant, Daryl Dean Smith complied with every request made of him by garnishee," and held the company had not sustained the burden of proving lack of cooperation.

The Supreme Court established the law of Missouri to be as follows (Page 15):

> "The burden of proof upon the queston of compliance with the provisions of a policy ordinarily rests upon the insured, if he seeks to recover indemnity under the policy, or upon the injured party, as here, who stands in the shoes of the insured. However, while it may be stated generally, as we have, that plaintiff had the burden of proving the facts essential to the garnishee's liability, yet in the instant case, where garnishee seeks to escape coverage solely because of an alleged breach of a policy provision requiring the insured to cooperate with the insurer, the burden was upon it to prove facts which would make that provision relieve appellant from liability. Kelso v. Kelso, Mo. Sup., 306 S. W. 2d 534, 536 [1, 2]; Wendorff v. Missouri State Life Ins. Co., 318 Mo. 363, 1 S. W. 2d 99, 101 [1, 2]. See Fischer v. Western & Southern Indemnity Co., 233 Mo. App. 885, 110 S. W. 2d 811, 815 [1, 2], where the affirmative defense of failure to cooperate was sustained by a jury. And see Donaldson v. Farm Bureau Mut. Automobile Ins. Co., 339 Pa. 106, 14 A. 2d 117, 118 [1, 2]."

On page 16 the Court discussed *Northwestern Mutual Ins. Co.* v. *Independence Mutual Ins. Co.*, 319 S. W. 2d 898, pointing out that the St. Louis Court of Appeals had stated: "Where the condition [breached] is expressly

made a condition precedent, the insurer is relieved of liability whether or not the insurer has been injured or prejudiced by the breach of condition."

At this point the Supreme Court of Missouri had the perfect opportunity to declare that this was not the law of Missouri. It did not do so! Instead, in the very next sentence after the above quotation, it said, "In the case now before us we hereinafter find full compliance with conditions No. 16 and No. 6 of the policy's provisions and conditions." The Court could make such a finding because, as it stated, the appeal was governed by Supreme Court Rule 73.01, V. A.M.R., which provides, "The appellate court shall review the case upon the law and the evidence as in suits of an equitable nature."

We thus reach the denouement after a systematic exposition of Missouri decisions. If the contract of insurance contains the magic words, "condition precedent", the law may be succinctly summarized as follows:

1. The insurance company has the burden of proving a breach of the cooperation condition.
2. The insured has the burden of proving compliance with all other conditions, including the fact that reasonable notice was given.

E. District of Columbia Law

In fairness to the trial judge, it must be pointed out that the case was neither pretried, tried, nor argued on Missouri Law. The idea of applying Missouri Law is presented to this Court for the first time. A search of the record discloses that Appellant's trial counsel never contended that Missouri Law applied and thus did not present a Trial Brief, which is mandatory in cases involving foreign law. This Court is referred to "Pretrial Instructions to Counsel," an Appendix to the Rules of The United States District Court for The District of Columbia, page

381 et seq., *Rules Service Co.* Part F, appearing on page 387 contains the following requirement:

> "F. TRIAL BRIEF:
>
> In any case involving foreign law or complicated legal issues the parties shall, and in all other cases the parties may, furnish a brief statement of the points of law involved, giving the text of and citation to any relevant foreign statute, and citations of the authorities in support of each point upon which the party intends to rely at trial."

Appellant's change of theories in the Court of Appeals has necessitated an inordinately involved Brief by Appellee. However, the laws of Missouri and the District of Columbia, as enunciated by the highest appellate courts of both jurisdictions, are identical with respect to "conditions precedent."

While the courts of the District of Columbia have never had occasion to decide a case on the "notice" provision of a policy of liability insurance, they have decided "notice" provisions of a fidelity bond, a surety bond and a fire insurance policy, from which an analogy can be drawn.

In *United States Shipping Board Merchant Fleet Corporation* v. *Aetna Casualty & Surety Company*, 68 App. D. C. 366, 98 F. 2d 238 (1938), a fidelity bond case, this Court upheld the reasonableness of the "notice" requirement and the fact that the insurance company was not required to show that it was prejudiced by failure to receive notice. This Court said on page 370:

> "By almost universal custom fidelity bonds as now written require notice of default within a limited period of time, and that provision the courts enforce according to its strict terms. And in such a case it is immaterial whether the surety is able to show it was prejudiced by failure to receive notice, for the contract is enforced in accordance with its terms and the question of prejudice does not affect the result. Notice is of the essence of the contract, and compliance with

> its terms is indispensable to fix liability. This is the rule so far as we know without exception in the federal courts. (Cases cited.)"

A similar result was reached by this Court in *Adelman* v. *St. Louis Fire and Marine Insurance Company,* 110 U.S. App. D. C. 392, 293 F. 2d 869 (1961), certiorari denied 82 S. Ct. 379, 368 U.S. 937, 7 L. Ed. 2d 337, a fire insurance case, where it was held that failure to file proof of loss within the time required by the policy vitiated coverage.

In *United States Plywood Corporation* v. *Continental Casualty Company,* 157 A. 2d 286 (1960), a surety bond case, the Municipal Court of Appeals for the District of Columbia stated, "The weight of authority holds that where the notice provision is reasonable and is stated as a *condition precedent* to the right of instituting legal action, failure to observe it will discharge the surety." (Emphasis supplied).

In discussing "condition precedent" and the fact that there was no ambiguity in the language of the contract, the court explained on page 288:

> "It is manifest from the instrument itself that the notice of default is a condition precedent to a right of action. There is no ambiguity in the language of the contract and accordingly the application of rules of construction to achieve a different result would be improper. Courts are not at liberty to ignore the plain language and intent of the contracting parties. To do so would require them to impose liability the parties have not contracted for, or have specifically contracted against. As stated previously, for its protection, the surety is free to impose conditions on its liability so long as they are reasonable."

F. The Law Elsewhere

The courts throughout the United States have written a prodigious number of decisions involving policies with "condition precedent" clauses. It would serve little pur-

pose to cite them, since they follow the rule making reasonable notice a "condition precedent" to liability. The court is referred to 18 A.L.R. 2d 452 and the cases cited in support of the following statement:

> "It appears to be well settled that if a liability policy expressly makes the insured's failure to give timely notice a ground of forfeiture, or compliance a condition precedent to liability, no recovery can be had where timely notice has not been given. The following later cases support this general rule either expressly or by necessary implication."

The cases cited in A. L. R. and other cases, such as *Rural Educational Ass'n., Inc.* v. *American Fire & Casualty Co.*, 207 F. 2d 596 (6th Cir.), were cited to the trial court when it considered the Motion for Directed Verdict. Appellant neither cited nor argued Missouri Law to it.

The general law regarding policies which make reasonable notice a "condition precedent" is summarized in 29 A *Am. Jur.*, Insurance § 1380, page 497, as follows:

> "It is generally held that a provision in a liability policy for 'immediate,' 'prompt,' etc., notice is of the essence of the contract and that a failure to comply with such provision will defeat recovery upon the policy, at least where the provision is preceded by words expressly declaring the insurance 'subject to the following conditions,' among which is listed the provision in question. Some policies expressly provide that a literal and strict compliance with the requirements of a condition as to notice of accident, etc., is of the essence of the contract and a condition precedent to recovery under the policy. Certainly, a failure to give the 'immediate' notice of accident required by the clause will prevent a recovery where the policy expressly states that 'this insurance is subject to the following conditions, which are to be construed as conditions precedent of this contract,' the clause in question being among those referred to."

It should be mentioned tangentially that the Frank J. Rebholz from whom insured secured her insurance and

requested the substitution of the two automobiles, was not an agent of Appellee. He was insured's broker. (J. A. 41, 51). The last paragraph of the policy provides that its agent must sign the "declarations page" (J. A. 64), and its agent's signature clearly appears thereon as "Louis H. Antoine." (J. A. 65). Even a superficial glance at the original policy which is part of the record reveals that Mr. Rebholtz's name is affixed by a sticker to the upper right hand corner, as appears on J. A. 61. There is no evidence that Mr. Rebholz was ever notified of the accident or the injuries, but even if he had been, that would not be notice to Appellee, since Mr. Rebholz was not its agent.

A close scrutiny of the Pretrial Proceedings shows that Appellant never contended nor raised the issue that the insured, Miss Osborne, ever gave reasonable notice of the accident or injuries to Appellee. Its first notice came almost eight months later from Mr. Rosenthal, who was attorney for both Miss Waters and Miss Osborne. When the facts are undisputed the determination of what is reasonable time to give notice is a question of law. See 29 A *Am. Jur.*, Insurance § 1379.

II

THE CONTRACTUAL OBLIGATION OF NOTICE CONTAINED IN THE INSURANCE POLICY IS REASONABLE AND PROPER

While ruling on Appellee's Motion for Directed Verdict, the trial judge said:

> "Plaintiff's evidence shows that the Insurance Company did not receive from the insured—Osborne—or her agent notice of the injuries alleged to have been sustained by the plaintiff until letter of April 21, 1958, nearly eight months after the accident, which occurred September 7, 1957. Those of us who deal in the tort field, and peculiarly so in the matter of traffic cases and automobile accidents, know that you either get your witnesses promptly or you do not have witnesses." (J. A. 59)

The trial judge was only echoing what is well known to all investigators, lawyers and judges. The 7th Circuit Court of Appeals stated it thus in *Hawkeye-Security Ins. Co.* v. *Myers,* 210 F. 2d 890:

> "The provision that the assured shall give timely notice of an accident is a reasonable requirement which is ordinarily inserted in insurance policies covering public liability. Such a notice, if promptly given, enables the insurer to make an investigation of the accident while the circumstances are still fresh in the minds of the parties involved and of the witnesses. The insurer may thus advise itself as to whether it should settle any claim arising therefrom or whether it should prepare to defend any action which might be brought to recover damages for any injury caused by the accident. The failure to comply with such a provision, where compliance has not been waived by the insurer, relieves the insurer of liabilities arising out of that accident. Clements v. Preferred Accident Insurance Co., 8th Cir., 41 F. 2d 470, 472, 76 A. L. R. 17."

The 5th Circuit Court of Appeals discussed the necessity of notice for the reciprocal protection of both parties to the contract, the insurer and the insured, in the case of *Yorkshire Indemnity Company* v. *Roosth & Genecov Products Co.,* 252 F. 2d 650 (1958), as follows:

> "We echo what the Texas Courts have so often said. Prompt notice of an accident is a reasonable requirement. Insurance companies under the pressure both of traditional schemes of statutory penalties and the general adverse psychological climate in litigation are expected to perform fully and quickly. To enable them to fill the law's demands, they must have notice of occurrences likely to give rise to claims under the policy. Prompt and thorough investigation by competent, trained persons is essential. The longer it is postponed the greater the likelihood of the loss of valuable information or available evidence. And since a liability policy, as does this one, provides *defense* as well as indemnity, which in turn requires

the exercise of due care or good faith in the settlement of claims within the monetary policy limits, the Insurer, for the protection of itself against further 'excess' claims and for the protection of the Assured against risks inherent in the necessity of obtaining full protection through any such uncertain claims, is entitled to the earliest practicable knowledge of the case."

III

THE TRIAL COURT DID NOT ERR IN GRANTING A DIRECTED VERDICT ON THE ALTERNATIVE GROUNDS THAT THE INSURED MISREPRESENTED THE OWNERSHIP OF THE AUTOMOBILE INSURED BY GARNISHEE

Because Appellant has presented new issues not considered by the trial court, Appellee will discuss this section of argument in four divisions:

A. The Issue Tried Below, Namely Joint or Sole Ownership, Was Decided Correctly by the Trial Judge

This case was tried below on the issues framed at Pretrial and on the "Undisputed Facts" stipulated to by the parties. At Pretrial the parties agreed that, "The Insured represented at the time of the substitution that she was the sole owner of the 1957 Chevrolet, which was purchased from Nalley Chevrolet, Inc., Atlanta, Georgia under date of July 9, 1957," and that, "The bill of sale from Nalley Chevrolet, Inc. named 'Doris V. Osborne & Edith Waters' as the purchasers of a 1957 Chevrolet, and the Nalley Chevrolet, Inc. Customer's Statement was signed by 'Edythe Waters' as was a Purchaser's Statement blank." (A. A. 2a). Defense d. raised by appellee was as follows: "The Company is not liable because of the misrepresentation of its insured as to the ownership of the car, which was a material misrepresentation to the continuance of the policy as more fully set forth above." (A. A. 6a). This issue was framed by Plaintiff's contention set forth on Page 4 of the Pretrial Order, "[In answer to the contentions of garnishee hereinafter set forth, P

denies that she had any interest in the 1957 Chevrolet covered by garnishee's policy.]" (A. A. 4a).

The case was tried on these facts and the Motion for Directed Verdict was argued to and decided by the trial court on the insured's representation of sole ownership, the Stipulations in the Pretrial Order and admissions at trial by Appellant and insured regarding their signatures on the various papers from Nalley Chevrolet.

Appellant's new attorney now advances to this Court a new theory based upon Missouri Law, not presented during the trial of this case. At trial Appellant proceeded on the theory that the car was not jointly owned and therefore the representation as to ownership was true. Having lost on that theory, she now contends through new counsel that even if the representation as to sole ownership by the insured were false, it does not count because it was only a lie to an insurance company.

At Pretrial the parties stipulated that when the policy was first issued insured warranted the car was owned by her (A. A. 1a), and when the automobile involved in the accident was substituted she represented that she was the sole owner. (A. A. 2a). The case was tried on those issues. Appellant now plays a semantic game and advances the syllogism that a misrepresentation is not a warranty and therefore not a lie; at least not when made to an insurance company. *Webster's Seventh New Collegiate Dictionary*, 1963 Ed., G. & C. Merriam Company, defines representation as, "An incidental or collateral statement of fact on the faith of which a contract is entered into."

29 Am. Jur., Insurance, § 698 states it this way:

> **"Definitions and Nature**—A 'representation,' in the law of insurance, is an oral or written statement by the insured or his authorized agent to the insurer or its authorized agent, made prior to the completion of the contract, giving information as to some fact or state

> of facts with respect to the subject of the insurance, which is intended or necessary for the purpose of enabling the insurer to determine whether it will accept the risk, and at what premium. Stated differently, a representation is not, strictly speaking, part of the insurance contract, but is collateral thereto. It is presenting the elements upon which the risk is either accepted or rejected. It may be made by implication from an allegation that is clearly subject to such a conclusion, but, in any event, an express or implied affirmation or denial of some fact is essential."

It will be observed that the insured, Miss Osborne, testified that she did not tell Mr. Rebholtz, her insurance broker, that Miss Waters was a joint owner of the car. (J. A. 51).

Concerning the effect of a misrepresentation, *29 Am. Jur.*, § 699 has the following to say:

> **"Effect of Misrepresentations**—There can be no doubt that a material false representation is a ground for the avoidance of an insurance policy, the same as any other contract, and that within limitations hereinafter discussed, such a misrepresentation by the insured renders the insurance contract voidable at the option of the insurer, although the policy is not thereby rendered void ab initio."

Disraeli told us that, "Justice is truth in action." Truth is precious and divine; originally the cornerstone of jurisprudence back in the days when a man's word was his bond. So great is the apostasy, the moral degeneration, that we now hear advanced argument that one may prevaricate with impunity to an insurance company because it is only a malefactor of great wealth, subject to a different rule of law and hence fair game for all who would deceive.

Advancing this new theory is manifestly unjust to the trial judge, who decided the case on the issues framed at Pretrial and presented at trial.

This new theory is unquestionably unfair to Appellee, who made an irrevocable decision not to defend the original suit seven years ago. In deciding whether it was required to defend the case, Appellee was required to consider only those allegations contained in the Complaint. As the Municipal Court of Appeals for the District of Columbia said in *Boyle* v. *National Cas. Co.*, 84 A 2d 614 (1951), "The obligation of the insurance company to defend an action against insured, as distinguished from its obligation to pay a judgment in that action, by the overwhelming weight of authority, is to be determined by the allegations of the Complaint. This obligation is not affected by facts ascertained before suit or developed in the process of litigation or by the ultimate outcome of the suit." The Complaint filed herein alleged, ". . . ; the automobile herein concerned was jointly owned by the plaintiff and defendant." (J. A. 1).

Appellant argues that it is not an egregious sin to swear falsely under oath, and that she can repudiate her Complaint, although made under solemn oath by her, and signed by her attorney, whose signature "constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information and belief there is a good ground to support it." Rule 11, Federal Rules of Civil Procedure.

The default entered against defendant below, Miss Osborne, admitted all facts well pleaded. Rule 8(d) of the Federal Rules of Civil Procedure provides, "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." The Municipal Court of Appeals for the District of Columbia reviewed the historical basis for an identically worded rule of the old Municipal Court of the District of Columbia in *Anderson* v. *Gallman*, 99 A 2d 560 (1953), a case where

default was taken because no Answer was filed. The court said:

> "Here, a responsive pleading was required but none was filed. Failure to answer admitted the truth of the allegations of the complaint except the amount of damages claimed."

Having tried her case by denying joint ownership and losing because all evidence, save self-serving declarations, was against her, Appellant comes forward with a new theory, which should be rejected by this Court.

B. Missouri Law Is Inappropriate to Determine Title to a Georgia Automobile and the Trial Court Was Never Asked to Apply Missouri Law

Missouri Law is particularly inapplicable to decide this issue because that state has a law requiring Certificate of Title to be issued for automobiles. The principal case relied upon by Appellant on page 28 of her Brief, *Kelso* v. *Kelso,* 306 S. W. 2d 534, involved the question of joint ownership of an automobile by plaintiff and defendant. Only one name appeared on the title, and the court pointed out that under the provisions of Sec. 301.210 R. S. Mo. 1949, V. A. M. S. if a name is not included on the title a person acquires no title to or insurable interest in the automobile.

The case of *Allstate Ins. Co.* v. *Hartford Accident & Indemnity Co.,* 311 S. W. 2d 41, listed in the "Table of Cases" in the typewritten copy of Appellant's Brief served upon Appellee in accordance with Rule 18(d) of the Rules of this Court, but omitted from her printed Brief subsequently filed, also held that under the same section of the Revised Statutes of Missouri there could be no sale of a motor vehicle unless the certificate of title passed.

It is of prime significance to note that the question of names on a certificate of title, as required by Missouri Law, is peculiarly inapplicable to this case because in 1957 when the automobile was purchased, Georgia was a "no

title" state. The purchaser received only a bill of sale for the automobile which was unregistered and untitled in the state. It was not until 1961 that the legislature of that state passed a certificate of title law, which was made effective March 1, 1962. (See 68:206-207, Code of Georgia, Annotated). That law even had a "grandfather" clause in it requiring certificates of titles on all 1963 and subsequent models, but permitting all older cars to remain untitled until January 1, 1969.

That is the reason Appellee was required to take the deposition of J. A. Crowell, Secretary and Treasurer of Nalley Chevrolet, Inc. and have him identify the 7 Exhibits set forth in the Pretrial Order (A. A. 7a), and then go through protracted questioning at trial to prove the signatures of Miss Waters and Miss Osborne on the Customer's Statement and Purchaser's Statement. If Georgia had issued a title all this would have been unnecessary, since a certified copy of the records of that State would have sufficed to prove joint ownership.

Appellee submits that joint ownership having been alleged in the Complaint, having been admitted by the default and having been proven at the trial, the trial judge was justified in directing a verdict on that ground as well as on the ground of failure to give notice.

C. The Misrepresentation as to Ownership Was Material to the Risk

An insurance company has the right to know with whom it is contracting. *McClanahan* v. *State Automobile Insurance Company*, 21 Tenn. App. 249, 108 S. W. 2d 1102. It is a well known fact that companies will not write policies for certain classes of people within stipulated age brackets. It is significant to note that Miss Osborne was not accepted as an insured while she was a member of the military, but was insured as a civilian before she joined. (J. A. 58).

In *Government Employees Insurance Company* v. *Powell,* 160 F. 2d 89 (1947), the court stated on page 92, "Insurance policies are contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware makes the contract voidable, at the insurer's option." The representation made by the insured must measure up to the standard and "it is immaterial whether or not he [the insured] actually intended to deceive the company."

Plaintiff was still giving direct testimony when the trial judge, thinking there was a genuine issue, stated ownership was a jury question. (J. A. 16). Thereafter she admitted swearing to the Complaint (J. A. 1-2) alleging joint ownership (J. A. 22-23), and acknowledged her signatures on the papers from Nalley Chevrolet, Inc. (J. A. 24-25). Subsequently the insured, Miss Osborne, tried to collaborate with her and corroborate sole ownership. However, on cross-examination she admitted the car was delivered to her and "sold to Doris V. Osborne and Edythe Waters." (J. A. 49). She also acknowledged the signatures of both plaintiff and defendant on the all important papers from Nalley Chevrolet, Inc. (J. A. 50), and admitted one of the reasons she did not report the accident to garnishee was because she and Miss Waters owned the car jointly. (J. A. 52).

These facts, coupled with the Undisputed Facts contained in the Pretrial Proceedings (A. A. 1a *et seq.*) regarding the signing of those papers legally made the ownership of the automobile vest jointly with them under Georgia's no title law, just as surely as if both of their names had appeared on a title. Significantly, Appellant has cited no cases where a person was trying to prove non-ownership when his name was on a title. Her cases all involve attempts to have another name added to a title by implication when it was not there to start with.

This Court can avail itself of the same opportunity the trial judge had by looking at the papers signed at Nalley Chevrolet, Inc. by both Miss Waters and Miss Osborne. They are attached to the deposition of J. A. Crowell, which is part of the Record in this case. After that has been done, each should agree that there was no issue of fact concerning ownership to be decided by the jury.

D. The Question of Retention or Return of Premiums Was Not Raised Below and Should Not Be Considered on Appeal

Once again, Appellant advances a new theory and claims for the first time before this Court that Appellee should have returned a portion of the premium to its insured. Appellant now terms this, "One of the most important factors concerning the entire case." (Page 27, Appellant's Brief). It seems incongruous that if this point is so important, it was not included as an issue in the trial below or in the Statement of Points on Appeal filed by Appellant in compliance with Rule 15 of the Rules of this Court. This Court should therefore not consider the new issue. It would appear that this is merely an incidental point first discovered by Appellant's attorney while doing research for the brief, and is being presented now as an anachronistic divination.

An analysis of the facts discloses that Miss Osborne was insured with Appellee before she joined the W. A. C. Her new policy was issued May 20, 1957 for the period from June 3, 1957 to June 3, 1958 at a premium of $93.48, computed on rates allowed by the State of Alabama. (J. A. 65). Subsequently, the address of the insured was changed to Georgia and an additional premium of $8.72 was charged to conform with the rates established by the State of Georgia (J. A. 66). On July 9, 1957 the new car was substituted and, since certain coverages were deleted, the insured was refunded $46.85. (J. A. 67). On November 26, 1957 another new car was substituted for the same coverage with no change in premiums. (J. A. 68). Up until that

time Appellee had no knowledge that the automobile substituted on July 9, 1957 was not owned solely by Miss Osborne. This information was not disclosed until May 5, 1958 (J. A. 51-53) and thereafter Appellee cancelled Miss Osborne's insurance (J. A. 41-42). Since this issue was not raised at the trial, the trial court did not hear the financial evidence of this transaction, and this Court should not consider this speculative point.

IV

THE VERDICT SHOULD BE AFFIRMED BECAUSE INSURED BREACHED THE COOPERATION CLAUSE OF THE CONTRACT OF INSURANCE, EVEN THOUGH THE TRIAL COURT DID NOT USE THAT DEFENSE AS A BASIS FOR ITS DECISION

The third reason for non-liability advanced by Appellee was the lack of cooperation on the part of the insured. The trial judge stated that there was much merit to that ground of defense, but he did not utilize it in directing a verdict. For the purpose of argument, Appellee will concede that it should have the burden of proving lack of cooperation. However, a litigant may utilize any evidence produced by his adversary.

Appellee submits that this Court should affirm the directed verdict on the alternative ground of lack of cooperation, not relied upon by the trial judge.

Appellee need not present any evidence of lack of cooperation than that presented by Appellant herself. Collaboration with one's adversary is not cooperation with one's company. To paraphrase a well known legal axiom, "Parties may not litigate by day and equivocate by night." Consider Appellant's evidence.

1. Insured and plaintiff had a close personal relationship for a year and a half before the accident, which came under government scrutiny.
2. After Insured's General Discharge from the W.A.C., she moved to the District of Columbia, rather than

back to her home. This was not done just because she wanted to be with Miss Waters.

3. Insured took an apartment on 16th Street and Plaintiff visited her when out of the hospital on pass.

4. Insured took her lawyer to Walter Reed Hospital and introduced him to Plaintiff, who retained him to sue the insured.

5. Somehow or other the insured's lawyer, who was then also the Plaintiff's lawyer, secured the name and address of the insurance company and the number of the policy, A-16861119.

6. Subsequently, the insured's insurance policy ended up in Plaintiff's attorney's file.

7. Insured never reported the accident or the injuries to her insurance company, but discussed the accident with her attorney, who also represented the Plaintiff.

8. When Plaintiff was discharged from the hospital she went to live with insured on Downing Street, N. E., and continued to live with her for a year.

9. When the U. S. Marshal served the Complaint, he either served the insured, or the plaintiff, under Rule 4, and she gave it to the insured.

10. When the insurance company returned the Complaint to insured, the Registered Receipt was signed by Plaintiff.

11. Insured took no steps to contest the case and was still living with Plaintiff when default was taken against her.

12. Insured was still living with Plaintiff when the inquisition was had and judgment entered against her. Indeed, the insured might have even driven Plaintiff to court to get the judgment, or maybe plaintiff took a cab.

13. Insured remained friendly with Plaintiff, visiting each other on weekends, even up until the garnishment action was tried, and Plaintiff had taken no steps to collect the judgment from insured or report the judgment to the Director of Motor Vehicles and Traffic.

Need Appellee produce any stronger proof of who was receiving the cooperation of its insured?

CONCLUSION

Appellee submits that this Court should affirm the Directed Verdict on either, or both, of the two grounds utilized by the trial court, or on the alternative ground that the insured breached the cooperation clause of the policy.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

EDYTHE F. WATERS
Plaintiff
v.
DORIS V. OSBORNE
AMERICAN AUTOMOBILE INSURANCE COMPANY
Defendant

Civil Action No. 2116-58

April 7, 1965

FILED
APR 7, 1965
HARRY M. HULL, CLERK

Pretrial Proceedings

STATEMENT OF NATURE OF CASE:

On traverse to answer of garnishee.

UNDISPUTED FACTS:

On or about June 3, 1957, garnishee, American Automobile Insurance Company, a corporation, issued to defendant, Doris V. Osborne, a policy of insurance, Policy No. A-1686119, with limits of liability of $25,000-$50,000 bodily injury, $5,000 property damage, $500 medical payments, actual cash value for comprehensive, and $50 deductible collision coverage. The automobile insured was a 1952 Chevrolet 2-door sedan, which Doris V. Osborne warranted was owned by her. The policy of insurance was issued by garnishee in Missouri and mailed by its agent from his office in Missouri to the insured, who was temporarily stationed at Fort McClellan, Alabama. At the time, insured was a member of the Armed Forces of the United States, a WAC private.

On or about July 9, 1957, upon the insured's request, the 1952 Chevrolet coverage was cancelled and a "substitution

of automobile'' form was made effective, which substituted for the 1952 Chevrolet previously insured, a 1957 Chevrolet 2-door sedan, and the comprehensive and collision coverages were deleted from the policy. The insured represented at the time of the substitution that she was the sole owner of the 1957 Chevrolet, which was purchased from Nalley Chevrolet, Inc., Atlanta, Georgia, under date of July 9, 1957.

The bill of sale from Nalley Chevrolet, Inc. named ''Doris V. Osborn & Edith Waters'' as the purchasers of a 1957 Chevrolet, and the Nalley Chevrolet, Inc. Customer's Statement was signed by ''Edythe Waters'' as was a Purchaser's Statement blank.

On Sept. 7, 1957, the 1957 Chevrolet was involved in an automobile accident in South Carolina. Both Doris V. Osborne and Edythe F. Waters were in said car at the time of the accident.

On April 21, 1958, one Gilbert Rosenthal, an attorney in Baltimore, Maryland, wrote the agent of garnishee company in St. Louis, Missouri, advising that his office had been retained to represent P herein Edythe F. Waters in a personal injury claim against D Osborn, arising from said accident.

Thereafter garnishee disclaimed any liability under its policy as to any claims arising from said accident.

On August 15, 1958, P Edythe F. Waters filed this action against D Doris V. Osborne for damages for personal injuries sustained in the accident of Sept. 7, 1957., and garnishee was furnished a copy of the complaint. No answer was filed on behalf of D Osborne and on April 16, 1959 the Clerk noted a default as to D Osborne. The case was set down for a damage inquisition by order of May 12, 1959, and on July 3, 1959, the Court entered a judgment on the default upon the inquisition, in favor of P against

the D in the sum of $100,000 with interest from date of judgment, and costs.

Thereafter P issued a writ of attachment directed to American Automobile Insurance Company, as garnishee. On Aug. 29, 1960 the garnishee filed answer thereto, stating it had no assets or credits of D in its possession, and on Oct. 25, 1960 P filed a traverse to the garnishee's answers.

PLAINTIFF contends that under Policy No. A-1686119, issued by garnishee insurance company to D Osborne, garnishee was obligated to pay on behalf of the insured all sums which the insured should become legally obligated to pay as damages because of bodily injury arising out of the ownership, maintenance or use of the 1957 Chevrolet automobile; that garnishee company was further obligated to defend any suit alleging such bodily injuries and seeking damages payable under the terms of the policy, even if any of the allegations of the suit were groundless, false or fraudulent.

P asserts that on July 10, 1959, a copy of the judgment herein was forwarded to D's carrier, but no effort or attempt was made by garnishee to make investigation and settlement of the claim or suit;

That in due course, on Aug. 9, 1960, the attachment was issued against garnishee, D's carrier; that the negative answers to both interrogatories in said attachment were untrue.

P asserts that her damages having been proven, and judgment entered, P has no need now to prove damages, and D's carrier is obligated to pay the judgment, which as of April 3, 1965, including interest, amounts to $134,500.

P asserts that although the bodily injuries coverage of the policy limits the carrier's liability to $25,000 for each person, garnishee company is liable to P for the full re-

covery of $134,500 in satisfaction of the judgment as entered, said carrier having breached its obligation under the policy to "defend any suit alleging such bodily injury or property damage and seeking damages which are payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but the company may make such investigation and settlement of any claim or suit as it deems expedient."

P asserts that the carrier had ample opportunity to defend or to offer settlement of P's claim within the limits of its policy, but did not; and that the carrier cannot now take advantage of the limits of its liabilities set forth in the policy issued so as to have the advantage of its own lack of good faith and/or care.

[In answer to the contentions of garnishee hereinafter set forth, P denies that she had any interest in the 1957 Chevrolet covered by garnishee's policy.]

P asks judgment against garnishee in the amount of $100,000, with interest of 6% from July 3, 1959 to April 3, 1965 and the additional sum of $34,500, plus interest at the rate of 6% or $16.66 per day for each day subsequent to April 3, 1965 until the carrier discharges its obligation.

GARNISHEE denies that it had any goods, chattels, or credits of D in its possession or charge or was indebted to D in any amount at the time of service of the writ of attachment.

P asserts that at the time of the issuance of the policy on or about June 3, 1957 to D Osborne, insured was a member of the Armed Forces of the United States and ordinarily would not have been covered except as an accommodation to her employer and at its request;

That at the time of the substitution of the 1957 Chevrolet 2-door sedan (involved in the accident here in issue) insured represented that she was the sole owner of the 1957 Chevrolet, whereas in fact said Chevrolet had been pur-

chased jointly by her and P, Edythe Waters, from Nalley Chevrolet, Inc., Atlanta, Ga., but insured did not notify garnishee company that P had a joint interest in the automobile; that had garnishee been notified that P, an unmarried Army personnel of the lower three grades and under the age of 25 years, had an interest in the automobile, garnishee company would have declined to write the policy of insurance on the new automobile; that failure to inform garnishee of the joint ownership of the car substantially increased the risk assumed by the company, without its knowledge, and to its detriment and prejudice.

Garnishee further asserts that it has been alleged that at the time the automobile was being operated by one of its owners, Doris V. Osborne, the other owner, Edythe F. Waters, was a passenger; that the first notice the insurance company had of the accident of Sept. 7, 1957, was by the letter dated April 21, 1958 from the Baltimore attorney, Gilbert Rosenthal; that until that time neither P Waters nor D Osborne, or anyone on their behalf, had notified garnishee of said accident or of any claim which might be presented as a result of the accident; that D Osborne secured the services of Mr. Rosenthal to represent P Waters, and personally took Rosenthal to Walter Reed Hospital to meet P.

Garnishee further asserts that D admitted to it on May 5, 1958 that she had not reported the accident to garnishee, and on May 9, 1958 garnishee notified D Osborne that it was disclaiming any liability for any claims arising out of the accident of Sept. 7, 1957 because of D's violation of the policy in failing to give notice of the accident to garnishee as required, which failure prejudiced the insurer by denying it an opportunity to investigate promptly, negotiate and handle any policy claims which might arise;

That subsequently garnishee learned that insured had failed to inform it of the joint ownership of the car at the time of the substitution of automobile, and that the insured

had secured the services of an attorney for P, all to the detriment of garnishee company;

That subsequent to said disclaimer, P filed this suit and P and D agreed to allow a default judgment to be entered against D, which judgment was subsequently merged into a verdict ex parte; that at the time suit was filed, P and D resided together in the District of Columbia and continued to reside together for several years thereafter; that on the day P presented her ex parte proof upon which judgment was rendered, P and D were still living together and D knew the verdict was going to be entered against her on said date, but took no steps to defend herself, all to her detriment and now to the claimed detriment of garnishee.

DEFENSES:

a. The Garnishee denies that it has any liability to the Garnishor, P herein, but states, that, in the unlikely event that it should be held to be liable, its liability is limited to $25,000 in accordance with the terms of the insurance policy written and the Garnishment served herein.

b. The Garnishor P has no greater rights than the D, and all defenses available against the D are available against the Garnishor.

c. The Company is not liable because of the failure of the D to notify the Company within the terms of the policy, which is a condition precedent to recovery, by reason of which the Garnishee was prejudiced.

d. The Company is not liable because of the misrepresentation of its insured as to the ownership of the car, which was a material misrepresentation to the continuance of the policy as more fully set forth above.

e. The Company is not liable because of the failure of the Insured to cooperate with the Company, but instead cooperated with the P, who was suing her and to act in consort and collusion with her in the suit and in the entry of the judgment.

STIPULATIONS:

Facts under "UNDISPUTED FACTS".

It is stipulated the following may be admitted in evidence without formal proof, subject to all other objections:

P's PT Exhibit No. 1—Policy No. A1686119 issued by garnishee to D Osborne, (in possession of P's attorney).

Garnishee's *PT Exhibits:*

No. 1—bill of sale for '57 Chevrolet date 7/9/57

No. 2—invoice covering '57 Chevrolet

No. 3—Customer's Statement signed by Edythe Waters

No. 4.—Purchaser's Statement form signed by Osborne

No. 5—Purchaser's Statement form signed by Edythe Waters

No. 6—Insurance application signed by Osborne

No. 7—"New Car Get Ready"

[Garnishee's 1 through 7 are attached to deposition of J. A. Crowell filed herein July 15, 1963.]

Counsel agree to exchange within two weeks the names and addresses of all witnesses known to them, including expert witnesses but exclusive of impeachment witnesses (filing a copy of said list with the Clerk of the Court), and if they learn of any additional witnesses prior to trial, they will advise the Clerk and opposing counsel the names and addresses promptly and prior to trial.

The Examiner has requested counsel to come to the trial with the maximum authority to settle the case which will be allowed them by their principals.

Trial Attorneys: For P—J. Ambrose Kiley
For Garnishee—Denver H. Graham

/s/ ELIZABETH BUNTEN
Assistant Pretrial Examiner

/s/ J. AMBROSE KILEY
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